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No.

Supreme Court of the United States

October Term, 1998

JOHN GLAVARIS AND PATRICIA GLAVARIS; BENNY L. TOLLEY; JOEL BINDER; MARIT FIDEL; BERNARD FIDEL,
Petitioners,
vs.
HERBERT J. YOUNG; JAMES N. THAYER; JAY JANIS; JOHN R. WILLIAMSON; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K. S. BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE HUTTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS; GIBRALTAR, F.A.; MELVIN RIFKIND; GIBSON DUNN & CRUTCHER; KPMG PEAT MARWICK; ALVIN KANG; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H. DUDLEY; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON; KENNETH LEVENTHAL & COMPANY; RICHARD SPRAYREGEN; FEDERAL DEPOSIT INSURANCE COMPANY, as Receiver for Gibraltar Savings, F.A.
Respondents.

Petition For Writ Of Certiorari

APPENDIX

Volume I

Robert H. Bretz, Esq.
520 Washington Blvd., #428
Marina del Rey, CA 90292
310/578-1957
Attorney for Petitioners

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MYRON R. STAHL,
Plaintiff-Appellant,

v.

GIBRALTAR FINANCIAL CORPORATION,
Defendant-Appellee.

CASE NO. 96-55201
D.C. NO. CV-87-03147-MRP

JOHN GLAVARIS AND PATRICIA GLAVARIS;
BENNY L. TOLLEY,
Plaintiffs,

and

MYRON R. STAHL,
Plaintiff-Intervenor-Appellant,

v.

HERBERT J. YOUNG; JAMES N. THAYER; JAY JANIS, JOHN R. WILLIAMSON; JEROME NUSSBAUM; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K. S. BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE H. HUTTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS, F.A.; MELVIN RIFKIND; GIBSON DUNN & CRUTCHER; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H. DUDLEY; RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON; KENNETH LEVENTHAL; RICHARD SPRAYREGEN; JEROME NUSSBAUM,
Defendants- Appellees

CASE NO. 96-55230
D.C. NO. CV-90-06185-MRP

JOHN GLAVARIS AND PATRICIA GLAVARIS;
BENNY L. TOLLEY,
Plaintiffs - Appellants

v.

HERBERT J. YOUNG; JAMES N. THAYER, JAY JANIS; JOHN R. WILLIAMSON; JEROME NUSSBAUM; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K. S. BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE H. HUTTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS; GIBRALTAR, F.A.; MELVIN RIFKIND; GIBSON DUNN & CRUTCHER; KPMG PEAT MARWICK; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H. DUDLEY; FEDERAL DEPOSIT INSURANCE COMPANY, as Receiver as Receiver for Gibraltar Savings, F.A.; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON; KENNETH LEVENTHAL; RICHARD SPRAYREGEN; JEROME NUSSBAUM,
Defendants-Appellees.

CASE NO. 96-5544
D.C. NO. CV-90-06185-MRP

JOHN GLAVARIS AND PATRICIA GLAVARIS;
BENNY L. TOLLEY,
Plaintiffs,

and

MARIT FIDEL; BERNARD FIDEL; JOEL BINDER,
Plaintiff-Intervenors-Appellants.

v.

HERBERT J. YOUNG; JAMES THAYER; JAY JANIS; JOHN R. WILLIAMSON; JEROME NUSSBAUM; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K. S. BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE H. HUTTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS; GIBRALTAR, F.A.; MELVIN RIFKIND et al.; GIBSON DUNN & CRUTCHER; KPMG PEAT MARWICK; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H. DUDLEY; RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON; KENNETH LEVENTHAL; RICHARD SPRAYREGEN; JEROME NUSSBAUM,

Defendants-Appellees.

CASE NO. 96-55622
D.C. NO. CV-90-06185

MEMORANDUM

FILED FEBRUARY 19, 1998
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding
Argued and submitted November 5, 1997
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3

Before: CANBY and THOMPSON, Circuit Judges, and MOLLOY, District Judge.**

After carefully reviewing the arguments presented and the record, we affirm the district court's dismissal of the Glavaris plaintiffs, complaint and its denial of Bernard Fidel and Joel Binder's intervention motion for the reasons set forth by the district court in its thorough and well-reasoned Memorandum of Decision, filed on September 10, 1992; and Memorandum of Decision, filed on August 11, 1994. We also affirm the denial of Myron R. Stahl's intervention motion. The motion was not timely filed and intervention clearly would have prejudiced the parties in the Glavaris action. See County of Orange v. Air. Calif., 799 F.2d 535, 537-38 (9th Cir. 1986); Empire Blue Cross & Blue Shield v. Janet Greeson's A Place for Us, 62 F.3d 1217, 1220 (9th Cir. 1995).[1/]

We also affirm the district court's denial of Stahl's motion to amend his first amended complaint in Stahl v. Gibraltar Financial Corporation, No. 96-55201, and the district court's subsequent dismissal of that action with prejudice.

By his motion to amend, Stahl wanted to add officers and directors of Gibraltar Financial Corporation as defendants. He could have sought leave of the court to add these proposed defendants at any time after filing his complaint in 1987. He did not do so, but delayed filing his motion until October 1995, some eight years later. In addition to the passage of this inordinate amount of time, events occurred which should have prompted Stahl to seek leave to amend if he wanted to do so. He might have sought leave to amend upon remand of this case from our court in June 1992, or when the district court voiced concerns, in September 1992 and August 1994, about the Glavaris action proceeding as a class action, or when he himself informed the

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** Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

1/ We grant the Glavaris plaintiffs' motion for reconsideration. In case number 96-55444, the oversized reply brief is ordered filed. The officers and directors' motion to strike the reply brief is denied.

district court in September 1994 that he intended to seek leave to amend to add the directors and officers.

Stahl offers no justification for the delay. It is clear he was aware of the underlying facts and potential claims against the directors and officers at least by November 1990, when the Glavaris action was filed. A delay of eight years in these circumstances is not justified. See Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990).

The directors and officers Stahl wanted to add as defendants would have been seriously prejudiced if forced to defend themselves in the Stahl action. They had never been parties to the action, and any claims against them would have set forth different legal theories as to them and would have required proof of different facts, which would have required significant additional discovery. Moreover, during the eight-year period of delay, two of the directors died, depriving the defense of their assistance in defending the action.

Although the district court did not set forth its reasoning in denying Stahl's motion to amend, the reasons for the denial are apparent from the record as set forth above. In this circumstance, the district court did not abuse its discretion in denying Stahl's motion to amend his first amended complaint. See Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 691 (9th Cir. 1993).

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MYRON R. STAHL,
Plaintiff-Appellant,

v.

GIBRALTAR FINANCIAL CORPORATION,
Defendant-Appellee.

CASE NO. 96-55201
D.C. NO. CV-87-03147-MRP

JOHN GLAVARIS AND PATRICIA GLAVARIS;
BENNY L. TOLLEY,
Plaintiffs,

and

MYRON R. STAHL,
Plaintiff-Intervenor-Appellant,

v.

HERBERT J. YOUNG; JAMES N. THAYER; JAY JANIS, JOHN R. WILLIAMSON; JEROME NUSSBAUM; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K. S. BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE H. HUTTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS, F.A.; MELVIN RIFKIND; GIBSON DUNN & CRUTCHER; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H. DUDLEY; RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON;

KENNETH LEVENTHAL; RICHARD SPRAYREGEN; JEROME NUSSBAUM,
Defendants- Appellees

CASE NO. 96-55230
D.C. NO. CV-90-06185-MRP

JOHN GLAVARIS AND PATRICIA GLAVARIS; BENNY L. TOLLEY,
Plaintiffs - Appellants

v.

HERBERT J. YOUNG; JAMES N. THAYER, JAY JANIS; JOHN R. WILLIAMSON; JEROME NUSSBAUM; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K. S. BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE H. HUTTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS; GIBRALTAR, F.A.; MELVIN RIFKIND; GIBSON DUNN & CRUTCHER; KPMG PEAT MARWICK; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H. DUDLEY; FEDERAL DEPOSIT INSURANCE COMPANY, as Receiver as Receiver for Gibraltar Savings, F.A.; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON; KENNETH LEVENTHAL; RICHARD SPRAYREGEN; JEROME NUSSBAUM,
Defendants-Appellees.

CASE NO. 96-5544
D.C. NO. CV-90-06185-MRP

JOHN GLAVARIS AND PATRICIA GLAVARIS; BENNY L. TOLLEY,
Plaintiffs,

and

MARIT FIDEL; BERNARD FIDEL; JOEL BINDER,
Plaintiff-Intervenors-Appellants.

v.

HERBERT J. YOUNG; JAMES THAYER; JAY JANIS; JOHN R. WILLIAMSON; JEROME NUSSBAUM; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K. S. BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE H. HUTTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS; GIBRALTAR, F.A.; MELVIN RIFKIND et al.; GIBSON DUNN & CRUTCHER; KPMG PEAT MARWICK; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H. DUDLEY; RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON; KENNETH LEVENTHAL; RICHARD SPRAYREGEN; JEROME NUSSBAUM,
Defendants-Appellees.
CASE NO. 96-55622
D.C. NO. CV-90-06185

ORDER

FILED JUNE 2, 1998
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

Before: CANBY and THOMPSON, Circuit Judges, and MOLLOY, District Judge.

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* Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judge Thompson has voted to reject the suggestion for rehearing en banc, and Judges Canby and Molloy recommended rejection.

The suggestion for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and suggestion for a rehearing en banc is REJECTED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

JOHN GLAVARIS AND PATRICIA GLAVARIS;
BENNY L. TOLLEY in their individual
capacities and on behalf of
all persons similarly situated
Plaintiffs/Appellants,

v.

HERBERT J. YOUNG, et al.,
Defendants/Appellees,

AND INTERVENORS' APPEAL

Appeal No.'s 96-55444 and 96-55622
(USDC # CV-90-6185-MRP)

ADDENDUM
(Transcript of Oral Argument Before The Court)

IN SUPPORT OF PETITION FOR REHEARING EN BANC

Robert H. Bretz, Esq.
520 Washington Boulevard, #428
Marina del Rey, California 90292
310/578-1957
Attorney for Plaintiffs/Appellants

UNITED STATES COURT OF APPEALS

FOR THE NINTH DISTRICT

JOHN GLAVARIS AND PATRICIA GLAVARIS;
BENNY L. TOLLEY in their individual
capacities and on behalf of
all persons similarly situated
Plaintiffs/Appellants,

v.

HERBERT J. YOUNG, et al.,
Defendants/Appellees,

AND INTERVENORS' APPEAL

Appeal No.'s 96-55444 and 96-55622
(USDC # CV-90-6185-MRP)

UNOFFICIAL TRANSCRIPT
BEFORE THE NINTH CIRCUIT OF APPEALS
On
November 5, 1997

PASADENA, CALIFORNIA,
WEDNESDAY, NOVEMBER 5, 1997; 9:00 A.M.

COURTROOM 3 — BEFORE: THOMPSON AND CANBY, Circuit Judges, and MOLLOY, District Judge sitting by designation

APPEARANCES IN ORDER IN TRANSCRIPT.

For Plaintiff/
Appellants: Robert H. Bretz, Esq.

For Defendant/
Appellees: Martin C. Washton, Esq.
Stephen A. Kroft, Esq.
Carey B. Moorehead, Esq.

The Court: Lets see, in the Stahl case, I suspect we're going to hear from Mr. Bretz.

Mr. Bretz: That's right Your Honor.

The Court: You are Mr. Bretz?

Mr. Bretz: I am.

The Court: O.K.

Mr. Bretz: Good morning. If it please the Court, I am Robert H. Bretz.

I am here on behalf of the appellants in a series of cases that I will generally describe as Gibraltar related cases, the Stahl

case, the Glavaris case, the Binder and Fidel intervention cases. Unless the Court has any questions at the out set you'd like to direct at me, I'll - - I'd like to make a few observations.

First, the appellants believe this is an important case. We believe this case presents the Court with an opportunity to confirm some long standing precedent of this court and of the Supreme Court. It also, presents an opportunity to address and resolve some new and some interesting issues and we think important issues and ... and thereby to help set some policy on some areas that I think need to be addressed. The, the court has a long standing series of cases that basically say our precedence dictates that the question of notice of fraud is for the trier fact and in the courts Admiralty Fund case of 1982, Volk v. Davidson in 1987, General Bedding in 1991, Nevada Power, 1992; Grey v. Winthrop is the latest expression of that long standing precedent in 1996. The district court, as the Court knows, looked at the Gibraltar October 30th press release and made a factual determination regarding whether or not that press release put investors on notice of possible fraud. Ah -- the court determined the evidence, I think was, "irrefutable and uncontrovertible". The court - - the district court I think had picked that up out of the only exception this Court has ever recognized as this long standing line of precedent. And the court's decision just cannot be right. Ah that press release ah - of the issue of notice should have gone to the jury and ah -- and all of the evidence that the District court had available to it, what was pled in the complaint, but also the evidence that was submitted in response to the court's oral request for a copy of the press release that the court treated as Rule 56 motion, all of that evidence suggested that everybody was fooled by that press release - - not informed by it. You'll recall the market price didn't move at all, although the court said the market price plummeted, it stayed at four and a half dollars. The writers for the Wall Street Journal and the L.A. Times didn't seem to discern what the court found to be absolute, and in fact

the Assistant Commissioner of California was quoted in - - in the L.A. Times article saying that the Commissioner -- Department of Savings and Loan sees no reason to be concerned. The auditors who subsequently audited Gibraltar, financial statements had certified made - - made -- ah -- no allowance for any losses, didn't seemed to recognize, if you would again, what the court found was absolute. So we think that is ah -- not only a determinative but it almost is such a key point that if the court decides the Court erred, the district court erred, in that regard, literally every other single decision the court made follows from that erroneous decision. The Court has some unique -- the -- the case has some unique facts to it. Ah -- my guess is, this court has never ah -- seen an instance where there were two sets of audited financial statements for the same audited period, the same year and the date of the end of the audited period. Ah, as you know, Gibraltar was representing that there were appraisals and comparisons of values that were used to -- to ah -- validate, if you would, the price that the real estate developments were being carried upon. Ah -- but, I think one of the -- one of the important issues that's framed by this case, is the relationship between inquiry notice, constructive notice and fraudulent concealment. Inquiry notice doesn't translate very well and it seems very difficult to me to apply it to the corporate setting, the financial institution setting. This case -- this court has a line of cases recognizing that for pleading purposes, per Rule 9(b) fraud pleading purposes, that there needs to be an exception that the average public shareholder isn't going to understand all the information that is behind, if you would, the "corporate doors".

The Court: I suppose its -- its that the district courts looking not just at the information and the release which is this horrendous loss but it comes on top of statements not very long before hand saying everything was rosy and -- and you know

Mr. Bretz: But -- well, Your Honor first

The Court: for the year and

Mr. Bretz: First -- first of all, I know this, in this day and age this sounds odd doesn't it? 155 million after tax affect loss -- its a lot of money to me.

But Gibraltar, I think was the seventh or eighth largest savings and loan in the country -- ah - its assets, I believe at that point in time, were 15 to 18 billion dollars. Gibraltar would have easily survived, as an institution, that loss. What really brought Gibraltar down in my mind and I believe the facts of the record will support that, was this un-hedged portfolio of mortgage backed securities, where -- ah -- the Federal Home Loan Bank Board of San Francisco had done a special audit and determined that there was - ah -- a 500 million dollar loss and that's what the Federal Home Loan bank Board determined was probably going to -- to cause Gibraltar's demise.

Now, to the courts question, -- ah -- the trends in the opinions and in this Court aren't "shoot now, ask questions" later. The trends are the Worlds Of Wonder case here in this Circuit, the Dileo v. Arthur Young case, I think, in the 7th Circuit, is that a large loss even if it is a big loss doesn't -- is not -- not necessarily indicative of fraud and -- and if it is, then do you understand that every plaintiff's lawyer when we see a big loss with that narrowing of the statutes of limitation that Lampf has rot wrought, if you would, ah -- you don't have a chance to do much investigation, and if I may, (729 on tape) and -- and although when you say everything is rosy, you remember that Gibraltar characterized the release in a way that was designed to answer your question.

It wasn't everything was rosy and -- and but "whoops" we've had a large loss before and we want to recognize it now and get it out of the way -- and get out of the real estate

business. They said we have decided to concentrate on our core business. We have a adopted a decision in the third quarter of 1987 to get out of that business and its this decision that has prompted us to decide to accelerate to sell -- and to accelerate the sale of our assets. And that accelerated sale of assets, the -- the supply and the demand equation if you would is not a perfect analogy, is going to cause us to take a loss; and so we are going to reserve against it now. And -- and I would argue that the district court saw a large loss reported but that loss was carefully crafted not to suggest that there had been impropriety. And if fact if you've read the -- ah -the articles, the New York Times article and the L.A. Times article, they kind of praised Gibraltar for getting out the real estate development business. This had kind-of-been a me -when Congress relaxed what savings and loan could do, Texas, Louisiana, California savings and loans had decided that the profits of the developers were making it look pretty attractive especially to the kind of staid, unexciting savings and loan business. So this press release was characterized in a away not to put anybody notice -- on notice of fraud and I don't think that not only didn't do that, I know it wasn't intended to do that. But it gave an excuse to why people should of actually thought this was a good idea. The market would suggest I am right. The financial writers would suggest I am right. The Assistant Commissioner of California Savings and Loan Department would suggest I am right. The auditors never -- ah -- took a position that there was wrongdoing, that there was fraud. And as you know, -- ah -- going back to my point that I think should be especially fascinating to this Court -- the relationship of constructive fraud to fraudulent concealment and in this case -- ah -- what I believe and I hope this Court believes is a serious abuse of trust -- by forming this so-called "independent" special investigation committee, that lulled the investors into believing that - that there was an ongoing meaningful investigation as to whether or not this large loss was the result of anything other than it had been represented to be. And, as you know, this special

investigation committee determined there was no actual wrong doing by Gibraltar's management, as it related to the announced real estate losses. The district court, of course, totally ignored the real omission in that October 30 release that had to do with the the bond losses.

Now, I believe, as I've tried to analyze this, I believe that where there is -- ah -- evidence of fraudulent concealment that -- that the law ought to be that - that the use of -- cons -- inquiry notice and constructive notice is precluded. Certainly in a context of a 12 (b) (6) motion, - - you know - - how do you fa - - how do you parse out the effect of the - - of the special investigation. How do you parch out the effect of the letter of April 24, 1980, -- ah -- 9. saying that even though they've imposed a conservatorship on us -- ah -- it was illegally, we're going to fight it. How - - how would an average investor believe that, after a special investigation has been conducted, that the average private investor could do anything. So again, I -- I think that the evidence of fraudu ... fraudulent concealment ought to preclude the effect of - - of inquiry notice and constructive notice and... and even if we didn't have the egregious example of the... of the misuse of a special investigation committee here -- ah -- if this Court will reflect on what the Wool v. Tandem Computer and the Moore v. Kayport cases mean -- where we've decided to relax the pleading standards under Rule 9(b).

The - its -- it -- its not realistic to believe that the average public shareholder in a publicly held corporation, within a year's period of time, is going to conduct any meaningful investigation of the -- of a financial institution like Gibraltar Savings without the help of management and... and discover anything. And, of course, the anomaly of what Judge Pfaelzer -- the conclusion that she came to here, although she never really addresses the second prong of constructive notice, were there facts that put an average investor on notice and what were

the reasonable facts he could of discovered if he didn't sit on his rights -- if he actually conducted a reasonable investigation? She never ad ... addressed that prong. She jumped over that prong, but the -- but the interesting thing is she concluded they would have discovered what the special investigation committee couldn't discover. That just doesn't make any since to me.

The Court: When was the special investigative committee constituted?

Mr. Bretz: Ah -- did -- you say when or how, Your Honor?

The Court: When.

Mr. Bretz: It was constituted shortly after the announcement of the loses which as you know took place in October of 1987 --

The Court: Right.

Mr. Bretz: -- and a shareholders derivative action was flied -- ah, in November of 1987, 1 believe it was ...

The Court: Why ... why was that committee constituted?

Mr. Bretz: - well - ah -- ah --, after the shareholder derivative action was filed on, I believe its October 17th, in Delaware and GFC, Gibraltar Financial Corporation is a Delaware corporation, in the shareholder derivative action setting, the directors of a corporation can preclude, if you would, a shareholders -- ah -- ah -- derivative action by forming a special investigation committee and deciding whether they want to want to take -- take control of that litigation that is a -- an -- instrument in Delaware law; and is being used, quite broadly now, for the corporation to retain control over litigation

that involves important corporate matters but -- by subjecting it to a truly vigorous independent investigation, independent members of the board of directors here. There should of been independent counsel, where there was not - -

The Court: The derivative action --

Mr. Bretz: Prompted --

The Court: filed October 17th --

Mr. Bretz: 17th of 87, Your Honor.

The Court: 87 --

Mr. Bretz: Right.

The Court: -- and the press release was September 30 --

Mr. Bretz: October 30.

The Court: October 30.

Unidentified Speaker: Yes.

Mr. Bretz: Did I say that right? October 30 is definitely the release and November 17th I believe is the shareholder derivative --

The Court: Nov -- November 17th on that.

Mr. Bretz: I miss November, right.

The Court: O.K.

Mr. Bretz: Now the -- the. Your Honor I think that unless you have any questions, I like to reserve the balance of my time for rebuttal.

The Court: That will be fine.

Mr. Bretz: Thank you.

The Court: Ah -- now I am not sure on this line-up on who we're going to hear from first, so just pop up and announce yourself and we'll check you off.

Mr. Washton: Morning.

May it please the Court, Martin Washton -- ah -- Mr. Kroft and I are going to share about 16 minutes and then we'd like -- ah some chance -- ah ... ah to -- ah -- answer any questions and permit others who are attending to -- ah -- answer any questions, or speak as well.

With respect to the -- the first issue that is -- ah -- what Mr. Bretz now alleges to be the major issue which Judge Pfaelzer ignored an finding that the October 30th press release, Wall Street Journal article, the New York Times article, the suspension of the dividends, the announcement of 250 million dollars in losses, a 153 or 154 after taxes, one of the largest quarterly losses ever announced, based upon. Mr. Bretz own allegations the price plummeted three dollars a share, again based upon the record created by Mr. Bretz --

The Court: He said the price didn't drop --

Mr. Washton: I -- I -- I understand that, Your Honor, I -- I -- I suggest to you that the Court's memorandum of decision makes it clear that the court relied upon Mr. Bretz' own pleadings in making that determination. Mr. Bretz says the

real issue was the failure to disclose the 500 million dollar loss in the press release, well its understandable that Judge Pfaelzer didn't focus on that because Mr. Bretz didn't focus on it in his complaint and unfortunately the description of the cause of action in the brief is not consistent with what's alleged in the complaint in fact the first time there is any mention of this issue of the -- ah -- bond losses in the complaint is at page 100 of the Second Amended Complaint and there it is alleged that following a special audit ah -- the Federal Home Loan Bank Board notified GFC and Gibraltar on or about October 20, 1987, that they had determined that were --- there were -- was unrealized loss and I underline that unrealized loss of approximately 500 million in the portfolio of fixed rate mortgage backed securities. An unrealized loss is what those of us who have pension plans suffered a couple of weeks ago when the stock market dropped 500 points. Unreal ... unrealized loss merely means that when you have bonds that have a fixed interest rate and interest rates fluctuate the value of those assets may fluctuate but its not a loss ... its not a loss which Gibraltar was required to disclose, its not a loss which Gibraltar to recognize. It was the kind of loss that any intelligent reader of Gibral --- Gibraltar financial statement could determine for himself by taking a look at what they own, and taking a look at what was going on in the market and determine whether or not those values will fluctuate. That's why Judge Pfaelzer didn't make note of that, the complaint didn't make note of it and what happened on October 31st.

Not only was the loss announced and dividends suspended but, in fact, it took no longer than three weeks for a derivative action be filed -- and five fraud class actions. Apparently, there was enough notice after the months and years of rosy statements, that everything was fine, that it was going to be another profitable year and that everything was -- was loo -- loo - looked ros -- rosy and looked bigger and better in the future. The institution was growing and it was profitable,

and suddenly they announced this loss, suddenly they suspended dividends. Its reported in press all over the country; and in fact six law suits have been filed in three weeks. I -- I submit that the inquiry notice doesn't mean the stockholders have to go out and make an investigation. Inquiry notice, when you are alleging fraud on the market, is was there information -- inconsistent information out there on the market, inconsistent with the prior rosy statements of management, which put stockholders on an inquiry notice to file a complaint. Certainly it resulted in the filing of such pleadings.

The Court: Mr. Washton, -- ahmm -- you make a pretty could arg ment -- ah -- that would extend or would include the officers and directors of the company. Maybe the auditors whose -- whose names are on the financial statements. Maybe not. Ah -- ah how about the attorneys. Were investors then put on inquiry notice -- as -- that there might be some fraud involvement by the attorney's, the accountants and the public relations people?

Mr. Washton: I think anybody who had any responsibility -- ah -- in a public way, for the prior public statements -- ah -- think that would be true. I think I'll let Mr. Kroft talk about the attorney issue because that one is a little close to heart, and -- ah -- that's why Mr. Kroft is here. But I would submit, Your Honor, based upon the allegations in this complaint, that the -- a -- auditors role was notorious in -- in approving the prior positive statements, that some how the attorney's were involve in drafting the prior positive statements, certainly it put -- ah -- anybody on an inquiry notice that something was wrong --

The Court: Is this because -- ah -- the general investing public should be put on inquiry notice that lawyers and accountants get involved in financial press releases and large

corporations typically have public relations people that help draw these, or probably draft them in the first place, then run them by lawyers and accountants --?

Mr. Washton: Well that's .. that's exactly what is alleged in the Complaint and for that reason we would agree -- your, that's the kind of inquiry notice that's created by the events that occurred in October and November of 87. Ahm -- I will also, ought to address that -- an -- we don't believe that -- ah -- we -- we're satisfied that inquiry notice caused the statute of limitations to run. I also briefly wanted to address the tolling issue, because - ah -- Mr. Bretz made much of it in his brief, and our position is that under the American Pipe case the only claims which were tolled were claims that were filed in those fraud class actions that were initiated in November of 87. And those were only stockholder class actions. There were no bond holder claims at all, and I think the -- Mr. Bretz himself acknowledges, that bondholders are different than stockholders. The responsibilities of officers, directors, professionals are different to creditors than they are to stockholders; and in fact the markets operate differently. The stock market can fluctuate widely. The bond market tends to fluctuate in reaction to interest rates in reaction to what's going in the stock market and the only time the -- ah -- bond market is adversely affected is -- is when it becomes apparent that the corporate creditors can be unable to repay the debt.

So, that, we don't believe there is any basis for -- ah -- tolling of any of the bond claims and that's why we believe that Judge Pfaelzer is correct in making all the statutes of limitations decisions that she did, including the proxy fraud claims -- ah -- which have not been alleged -- ah -- in a class action.

The Court: What about tolling any of the stock claims, was there any issue on that?

Mr. Washton: The -- the only issue on the tolling of a stock claim was -- it was tolled with respect to Mr. Young because Mr. Young had been named as a defendant In Re Gibraltar and -- ah -- that claim was settled -- ah -- that claim was set for trial, and settled.

Unidentified Speaker: That's right.

Mr. Washton: -- uhm -- the -- the only other claims were -- ah -- proxy claims and -- ah -- there were also some common law claims which were also barred by the statute of limitation because the same three year statute of limitations, that if adopted under the -- ah -- lOb-5 claims, applied to the state fraud claims. Ahm -- there was some mention by Mr. Bretz of this when our case -- ah -- because -- per -- at some point in time he claims there was a case that named all of the officers and directors or several of the officer and director defendants which was subsequently -- a -- dismissed; but that issue was never raised in the court below and there is nothing in the record that this Court can rely on in even passing upon that, in fact the Winnard case didn't even allege the very common law claims for which Mr. Bretz sought tolling when he asserted tolling by reason of the In Re Gibraltars securities litigation.

The Court: Let me ask you -- ah -- before you get away here, -- uhm -- we have - ah -- an appeal by -- ah -Glavaris before us --

Mr. Washton; Its really the Glavaris case, Your Honor, that I think both Mr. Bretz and I have been focusing on because the Glavaris case is the significant -- ahm -- securities claims, the common law claims, the Stahl case was filed in April of 1997 --

The Court: Let -- let me bring you back to Glavaris, Glavaris also settled in this case. Now how come we got this

appeal when he settled, is he -- ah - - was the settlement that he permitted him to appeal the issues on which the Court had previously ruled.

Mr. Washton: Exactly. When that case was settled -- ah -- his individual 10b-5 claim was settled and all other claims which had been dismissed --

The Court: Right.

Mr. Washton: -- were reserved for appeal; they were not dismissed --

The Court: - O.K.

Mr. Washton: -- and that's why we're here today.

The Court: O.K.

Mr. Washton: Uhm -- If the Court has no questions, I would like to turn it over to Mr. Kroft, because I know we have a lot of issues to cover.

The Court - O.K.

The Court: That ... that was Mr. Washton ... yeah.

Mr. Kroft: Morning.

The Court: Morning.

Mr. Kroft: I am Stephen Kroft, Your Honor. I represent the law firm of Gibson Dunn & Crutcher, which was the attorneys for Gibraltar Financial Corporation during the 1980's. I appreciate the Court's question about the statute of limitation

pertaining to attorneys, and I want to get to that in just a moment.

The Court: O.K.

Mr. Kroft: I want to start by saying, the record is undisputed that there was no purchase of any security by the plaintiffs in this case based on anything that was said or done in 1988 or 1989. There was apparently a purchase by Mr. Glavaris of a bond in June of 1989, but that was after the FSLIC had seized Gibraltar and all of its assets. So this case is really about what happened in 1986 and 1987. And with respect to 1987, I think it is important to look at the Grey v. Winthrop case, -- ah -- Judge Canby, I think had it just right -- when you have rosy predictions or mixed discussions and all of a sudden there is a clamorous bunch of news that starts inquiry notice even in a non-fraud on the market case. In the Grey v. Winthrop case, there did come a point where the court said, look there was such a big jolt of news we'll say at that point inquiry notice occurred, but the complaint was filed on time, before the date of that inquiry notice. Uhm -- there is no tolling issue by the way, Judge Thompson with respect to the attorney in this case because the attorneys were never defendants in any of those class actions filed in 1987 and 1988.

I think it is important to focus on the fact that this is a fraud on the market case, and that changes the inquiry notice analysis. The Cook case in the 4th circuit, and Judge Pfaelzer herself with pages 25 and 26 of her Memorandum of Decision, said that when the market is on inquiry notice that starts the statutes of limitations running. That is a little bit different than a situation such as the one posited by Mr. Bretz, where he says, well, can anybody find out when the market is on inquiry notice of enough to make an inquiry, that starts a statute running. That's, as I say, with the Cook held - - the Cook case held; and

that's what Judge Pfaelzer held. That makes perfect since, because how could you say that the statute of limitations doesn't start running for a particular plaintiff until he receives inquiry notice of a falsehood that was never communicated directly to him in the first place, it was only communicated to just the market. Just wouldn't make any sense. And with respect to the Court -- the Courts question about, would there be inquiry notices as to the lawyers. I think the fraud on the market analysis answers that in part. Its also answered, even if this was not a fraud on the market case, by the Bernson decision in the California Supreme Court which was cited in our brief and also by this Court's In Re Stac Electronics decision. Those cases make clear, that when a plaintiff is on inquiry notice as to claims of fraud against the corporation and its management, its on inquiry notice as to all participants in the allegedly fraud -- fraudulent scheme. Even if the plaintiff at that time doesn't know the identities or their involvement and that -- that rule ought to apply specially to Gibson, Dunn & Crutcher here, Your Honor, because Gibson, Dunn's representation of Gibraltar was well documented and it was easily ascertainable -- its name did appear in the 1987 proxy and also the 1988 proxy. So, I don't think there is any problem in dealing with the inquiry notice issue for the attorneys.

The Court: Well Mr. Kroft in -- I -- I -- I guess I might rock along with you, on your theory that well -- well let me just suggest, that lawyers and accountants are typical targets in any

kind of a -- a class action suit that's going to be brought against a company that fails --

Mr. Kroft: They sure are and in this case --

The Court: -- it -- its just the first ones you think of and their insurance companies and everything else. What about the

public relations firm, or is there someone else going to talk about the public relations firm?

Mr. Kroft - I don't represent the public relations firm, Your Honor, but again, the Bernson holding, says it doesn't matter if you don't know whom all of the participants were. When you're on inquiry notices to some, you have to sue and the way you can deal with that is you sue Doe Defendants -and if your discovery demonstrates to you that the public relations firm was involved you can substitute them for the doe party.

The Court: Well let --

Mr. Kroft. The Supreme Court of California was very clear about that --

The Court: Yea -- ah -- ah -- ah you know a -- a -- a -- reasonably sophisticated investor I think would know that when a company has good news or bad news they have -- ah -- public relations people that prepare the press releases and then run them by accountants and lawyers -- ah -- at least lawyers, -- ah -- but is that -- are they within this ambit of people who would be typically ... you ought to be on inquiry that maybe the public relations people here are at fault. I -- I -- I am just -- they seem a little beyond lawyers, accountants officers and directors.

Mr. Kroft: The public relations people's lawyer would probably say there way to far away to even be in this case. But I think the Bernson decision, Your Honor, does answer that questions -- California Supreme Court's decision.

I do want to emphasis that this isn't just a statute of limitation case, at least as it pertains to my client, the attorney's for Gibraltar Financial, because we don't believe there is anything pleaded in the complaint that states a claim against Gibson, Dunn & Crutcher. Judge Pfaelzer held that was so, in

part, and in part she didn't reach it because she ruled on statute of limitations grounds as to some of the claims. With respect to the l0b-5 and actual fraud claims that were served against Gibson, Dunn in this complaint, those claims basically rest on two general sets of allegations. The first is general allegations that Gibson, Dunn, I want to quote this, "drafted or otherwise prepared", or "participated in the drafting and preparation" of various public Gibraltar documents. You can find that at pages 67 and 73 and 79 to 81 in the complaint. But the problem with those allegations, is they don't say what exactly in those documents if anything Gibson, Dnn & Crutcher actually drafted and they certainly don't say that Gibson, Dunn & Crutcher drafted anything in those documents that was false. Innuendo that Gibson, Dunn & Crutcher may have done something wrg or maybe drafted something false is in that complaint. But innuendo doesn't substitute under Rule 9 (b) for specific factual allegations that this party did something that was false.

The Court: - Suppose we disagree with you, does it make any difference if Judge Pfaelzer was right on her statute of limitation decision?

Mr. Kroft: Well, if she was right on her statute of limitation decision then this whole case goes away. But I am saying, even she was not right, it still goes away as to the attorneys.

The second basis on the complaint for trying to hold Gibson, Dunn in this case, is the allegation - - is because Gibson, Dunn represented Gibraltar Financial Corporation, it owed a fiduciary duty to the shareholders, not only the shareholders, but the bondholders of the corporation, the debt holders, to publicly disclose everything that Gibson, Dunn & Crutcher had learned from its corporate client. Now we've cited cases at pages 47 and 48 and 54 and 55 of our brief that make it clear that, just because Gibson, Dunn & Crutcher was

a corporate attorney, it did not have a fiduciary obligation to blow the whistle on its client and make public disclosures to the -- to the shareholders and the bondholders. In fact, as the attorney for the corporation, Gibson, Dunn & Crutcher had a duty not to disclose information it received in confidence from its client.

Mr. Bretz raises a very interesting issue in his reply brief, in footnote 29, about the proxy fraud claim. He assumes that the Lampf analysis that applies to, one year, three year statute of limitation to l0b-5 actions, also would apply to 14 (a) proxy fraud claims; and I think he's right. What he says though is that analysis shouldn't be applied here because just like l0b-5 claims that were filed before June 1991 get to take advantage of the old statute of limitations, so should the proxy fraud claims. The problem with that analysis is the only way he gets there is that Congress passed a statute saying so in reaction to Lampf Section 27(a) of the)34 Act, but that statute only, specifically on its face, applies to 10b-5 actions not to proxy fraud actions, so I think the one year, three year Lampf statute does apply to the proxy claims, and specifically with respect to the 1987 proxy claims. Those claims would of started to run under the three year statute of repose when the 1987 annual meeting occurred in May, and three years it would of run in May of 1990. That was six months before this complaint was filed. And of course, after Central Bank there is no aiding and abetting proxy fraud claims just as there would not be an aiding and abetting l0b-5 claims. Judge Pfaelzer found that to be so on page -- like page 56 of her second Memorandum of Decision, and I think she is exactly right.

The last point I would like to make, Your Honor, is that with respect to the state law fraud and negligent misrepresentations claims that are set forth in the eighth, tenth and eleventh causes of action, those are state law claims. Under the California Supreme Court decision in Mirkin v.

Wasserman, plaintiffs can't pursue a fraud on the market theory for those claims. Plaintifffs have to plead actual individual reliance, they can't rely on the market. This complaint doesn't plead actual reliance in the way that Rule 9(b) requires. There are general allegations of reliance, I can give the Court the paragraphs if you'd like so that you don't have to go thumbing through this 150 page complaint, but there are no specific allegations that any of these plaintiffs actually read any false statement much less that they purchased any particular security based on any statement that they may have read that they claim is false. If the court has any other questions, I'd be happy to answer them, otherwise I think that concludes it, and gives us about - -

The Court: Apparently not Mr. Kroft

Mr. Kroft: -- ah .. do you have any other questions for anybody else on our side, I think we have a couple of minutes left, Your Honor?

The Court: Ah - no I don't ... ah, apparently not.

Mr. Kroft: I don't know if Mr. Washton has any thing to add.

The Court: Do the public relations people want to say anything at all?

Mr. Moorehead: We are head counsel for Melvin Rifkind and Rifkind, Pondel & Parsons. I'd like to echo basically what Mr. Kroft had to say.

Our clients were not defendants in any of the prior litigations. There would be no tolling with respect to them -- ah -- the complaint alleges similar to what was alleged against Gibson, Dunn & Crutcher, that we were -- that our clients were

involved in preparing certain documents. Uhm - - I think the Bernson case -- ah -- really does speak to that issue. Once the plaintiffs were put on notice, the market was put on notice of potential claims against Gibraltar, -- ah -- the statute of limitations began to run, they were on inquiry notice and at that point had the opportunity to conduct investigations, retain counsel, to conduct discovery and find out about Melvin Rifkind and Rifkind, Pondel & Parsons or anyone fulfilling that function.

The Court: And, now, your name was sir?

Mr. Moorehead: Terry Moorehead.

I understand that the Court did not receive my acknowledgment, we didn't receive that back in the mail, I can't explain why you don't have it.

The Court: Gotcha. Thank you Mr. Moorehead. O.K. Mr. Bretz.

Mr. Bretz: Your Honor -- Your Honors, I am struck as I hear three lawyers that addressed you tell you how an average public investor should be expected to launch an investigation after that October 30 press release and -- and discover fraud that ranged from retroactive indemnity agreements, to the capital maintenance agreement, to the bond losses, to the special investigation, if -- if that person is suppose to find fraud that ranges from not only the management but accountants and attorneys and financial public relations, I stand by my argument in this Court -- it isn't feasible, its not realistic and there -- there is only one case in California that addresses the issue as to the scope of the duty to investigate and -- ah -- inquiry notice, its call Courtney v. Warring, its not the case that the other sides is mentioning. Courtney v. Warring, cited in our brief, says that even though you are of inquiry notice on fraud

as is to management, it does not extend beyond that -- absent some additional facts. Now, Mr. Washton said that Judge Pfaelzer relied upon pleading in my complaint that the stock price -- that the stock price plummeted. Its not there. I don't know why he would say that, -- ah -- I believe I know where Judge Pfaelzer came up with that. She came up with that in an argument we had made in a different case, about a different time frame, but he miss speaks himself when he tells you that we alleged the stock price plummeted. The stock price didn't budge an eighth, if you would, aft -- after that October 30th announcement hit the street.

I am confused by Mr. Kroft's sta....

The Court: Just when did it budge?

Mr. Bretz: Ah -- I don't have that off the top of my head Your Honor, but it drifted down only slightly. You'll recall this was, there -- there are some interesting historical facts that were visit on here, the October 19, 19.. 8 ... 1987 stock crash. This in one of the -- ah -- ah -- ah -- one of the few companies that didn't have a big loss. As you know, we allege that Gibraltar used that opportunity, of bad news for everybody to - - to make this October 30th release, they had -- had made no decision to get out of the real estate business. But the stock price didn't ever plummet, it didn't ever give anybody a signal that there is the kind of wrongdoing, i.e. possible fraud, that ah -- that -- ah -- the other side hopes you'll discern from that release. I also, think it is a very interesting point, the Court has just recently issued a case ah called -- ah -- one in a series of cases, Epstein v. MCA. And in Epstein the Court was particularly harsh on a plaintiffs lawyer who settled a shareholders derivative action without really taking care of his client. Well that same lawyer settled the Gibraltar shareholder derivative action, no money paid to Gibraltar, no money paid by

the officer/director defendants, he walks away with quite a bit of money. But the interesting thing is aft...

The Court: Hows it help your case?

Mr. Bretz: Well let me make this point. After -- ah -- the settlement had been arrange Mr. LeRach got to conduct discovery, and one of the items in this records is Mr. LeRach's declaration after he had con -- conducted the discovery. We're asking the -- the average investor to have discovered ... a guy who is one of the preeminent plaintiffs forensic lawyers in the country -- he says I didn't find any smoking gun of fraud here. Once again, how is the average investor expected to have done that? Ah -there, Mr. Kroft says that -- ah -- that this -- this is a fraud on the market case. That's not true. Its a fraud on the market case and its an individual reliance case. He says the plaintiffs don't plea they actually read and relied upon corporate communications. That is not true. John Glavaris was a very diligent investor. He read everything that Gibraltar sent him. And, one of the major errors that Judge Pfaelzer made here, is after she determined that the October 30th release would have put the market on notice of possible fraud, she -- and she decided that would of happened by November 3, so in her quote "Period 2" - - it starts November 4, she never inquired as to whether or not Gibral... ah - - John Glavaris or Benny Tolley ever got that press release, the Court will recall, was not mailed to anybody. Ah -- these people live in -- in different areas than -- than the Los Angeles area; and, so, she just assumed that they -- they knew about it which they didn't know about it. You'll recall John Glavaris completed a purchase of stock on November 4, and if he thought there was possible fraud at the company, I doubt he would of done that. But this is an individual reliance case and after Judge Pfaelzer - - we believe erroneously - - decided that press release put people on inquiry notice and the conduct of the special investigation didn't -didn't stop with it or interfere with it, she needed to go the next step

with John Glavaris and say, by the way, did you get it, when did you learn? Because he does have his individual reliance claim and, more importantly, there is no fraud on the market in California. But you don't have to buy stock in what Judge Pfaelzer describes as period two to have a claim for breach of fiduciary duty, constructive fraud, fraud. She imposed an in connection with the purchase and sale of securities on all the plaintiffs, and all the class, on the state law claims. That was not right. Now, Mr. Washton said, that we argued the Winnard case served to toll John Glavaris' and the classes' Rule 10b-5 claims, he says against Mr. Young. Well it wasn't just Mr. Young that was named as a defendant in the In Re Gibraltar series of cases. There were seven or eight officers/directors named. And Ernst & Young was named just -- its just a mistake by Judge Pfaelzer if she's -- if she's going to acknowledge that In Re Gibraltar stays the claims against Mr. Young because he's an defendant In Re Gibraltar, she -- she has to also rule that -- that same tolling effect works for all the defendants that were named. Ah -- and I am not going to list their names of. They are in my brief. The -- ah -- a American Pipe, one of the other - - I think very interesting questions here. American Pipe and Crown Cork say that in a Rule 23 context, when somebody files a complaint and the facts in the complaint are sufficient to put the defendants on notice of -- of the kind of claims that are being alleged the generic -- ah -- group of plaintiffs, the amount of money that's involved they -- we've -- we've satisfied what the statute of limitations is -- is set up to accomplish. When the in Re Gibraltar complaints, plural, were flied they alleged wrongdoing that -- that should have encompassed both stock claims and bondholder claims -- public debt, public convertible debt. Why is it any different than stock? Why weren't the defendants put on notice of this potential series of claims? We argue that the filing of the In Re Gibraltar case not only -- ah -- ah -- served to toll, and put people on notice of the stock claims, but in bondholder claims too. And the other side does not rebut -- ah -what -- what -- I

was told - - and that's don't file that Glavaris complaint right now we are in negotiations with the insurance company to -- to settle both the stockholders and the bondholder claims, and your only going to disrupt things.So everybody was thinking it covered the bondholder claims too. I don't know why the bondholder claims weren't settled when In Re Gibraltar was settled - - other than more money. Maybe the insurance company just wasn't willing to settle at that point in time. But we argue that the American Pipe line of cases, and this courts Robin v. Fluor case, served to toll the statute of limitations on the various claims that Judge Pfaelzer decided -- ah -- had been lost because of this October 30th press release.

The Court: Mr. Bretz, -- ah -- your time has expired, lets see if we have any questions from the Court.

The Court: Yes I was -- I was looking in your brief where you make a ... 1st side of tape finished ... rest of question -- not finished at beginning of side two of tape).

Mr. Bretz: (Tape picks up at) ... but the Federal claims were both fraud on the market ... If John Glavaris had bought at four and a half dollars a share and the market, if you would, had been fooled by all the prior false misleading statements, as you know the concept is he -- he is indirectly damaged because the market price he pays is too high, but --but traditional Rule 10b-5 causes of action are individual reliance causes of action; and they are pled in the complaint too, Your Honor.

The Court: I guess than the question is, how they're supported and (tape bearly intelligible, but maybe says supported by affidavits).

Mr. Bretz: Well, remember, this was a 12 (b) (6) motion ah - -ah -- this -- this was ah -- ah -- ah -- all these plaintiffs

were dismissed, ah, while a stay was in effect
(Unintelligible because two persons speaking at the same time).

The Court: No discovery?

Mr. Bretz: No discovery.

The Court: O.K. (Unintelligible because two persons speaking at the same time).

Mr. Bretz: A very important point, -- ah -- may I have -- may I have one more minute, Your Honor?

The Court: Sure.

Mr. Bretz: Ah -- ah -- Mr. Kroft argued eloquently -- 140) that attorneys aren't supposed to have to blow the whistle on their clients -- ah -- I believe that. Ah -- but you'll recall that Gibson, Dunn stood up at the 1987 shareholders meeting and vouched for the accuracy of the -- of the proxy statement that said there was no basis for any claims, that the proxy statement was accurate and complete, but didn't disclose the capital maintenance agreement which really precluded Gibraltar Financial Corporation, if it ever got in trouble paying on the debt securities. Ah -- Gibson, Dunn -- ah -- gave press interviews, I don't understand how they can still maintain to this Court, that if I maintain my traditional -- ah -- ah -- attorney as confidential consultant. I am not required to have to -- ah -- to tattle on my client, but O.K. But when I am giving press interviews, does that mean -- mean that if I made a false statement that I get to come back and say that doesn't count? And how about the special investigation?

When your Honor says, well gee, everybody kinda knows to sue accountants and lawyers -- ah -- the trend is now - - is please don't just sue them because they have deep

pockets. Please have some factual basis to do it. Where was the factual basis to believe that Peat Marwick, or Ernst or -- or the -- the public relations firm or Gibson, Dunn had done anything wrong? And, Your Honor, if you had read that Gibraltar had -- had formed a special investigation and Gibson, Dunn was heading it up, would you assume that they would have taken that assignment if there was any question that they had done anything wrong? Well, of course not. And I ask this Court, once again, to step back - - remembering the -- the plight of the average public shareholder - - even if you don't have things like the special investigation. The - - the average shareholder doesn't have any ability to go out and investigate at the level that these people are arguing they could have and should have. If there are no other questions, -- ah --I appreciate the extra time.

The Court: Ah -- appear not to be. Thank you -- ah -- Mr. Bretz. And thank all counsel for -- ah -- their briefing and then for their arguments. Ah -- the case just argued will be submitted and we will be in recess until 9:00 A.M. tomorrow morning.

DECLARATION OF DEBBIE De VISO

The undersigned hereby declares that the foregoing unofficial transcript was prepared from a tape obtained by me from the Clerk of the United States Court of Appeals for the Ninth Circuit and is, to the best of my ability, an accurate and complete transcription of such tape recording of the oral argument before the Court on November 5, 1997, in the within captioned appeal.

This Declaration is given under penalty of perjury under the laws of the United States of America, and is made in Marina del Rey, California, on April 6, 1998.

DEBBIE DEVISO
Debbie De Viso

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, Debbie De Viso, am employed in the county aforesaid; I am over the age of 18 years and not a party to the within action; my business address is 520 Washington Boulevard, #428, Marina del Rey, California 90292.

On April 6, 1998, I served the foregoing document described as: "ADDENDUM (Transcript of Oral Argument Before the Court) IN SUPPORT OF PETITION FOR REHEARING EN BANC" on the following interested party(ies) by depositing true and correct copies of such document in the U.S. Mail, in a sealed envelope, postage prepaid, addressed as follows:

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Executed on April 6, 1998 in Marina del Rey, California.

X (Federal) I declare that I am employed in the office of a member of the bar of this Court as whose direction the service was made.

DEBBIE DE VISO
Debbie De Viso

SERVICE LIST

Ralph J. Shapira, Esq.
Diane E. Pritchard, Esq.
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071-2899

ATTORNEY FOR: KPMG Peat Marwick

Elizabeth W. Walker, Esq.
Lisa Popovich, Esq.
PAUL, HASTINGS, JANOFSKY & WALKER
555 South Flower Street, 23rd Floor
Los Angeles, CA 90071

ATTORNEYS FOR: Ernst & Whinney, Ernst & Young and William H. Dudley

J. Andrew Heaton, Esq.
ERNST & YOUNG, LLP
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036
Eugene R. Erbstoesser, Esq.
Gaelle Gralneck, Esq.
ERNST & YOUNG, LLP
515 South Flower Street, Suite 600
Los Angeles, CA 90071

ATTORNEYS FOR: Ernst & Whinney, Ernst & Young, William H. Dudley, Kenneth Leventhal & Company and Richard Sprayregen

\\continued\\

SERVICE LIST CONTINUED PAGE -2-

Harold G. Becks, Esq.
Ardis M. Conant, Esq.
WILSON & BECKS
5900 Wilshire Boulevard, Suite 2000
Los Angeles, California 90036-4276

ATTORNEYS FOR: Federal Deposit Insurance Corporation as successor to the RTC in its capacity as Receiver for Gibraltar Savings

Stephen A. Kroft, Esq.
Allan L. Schare, Esq.
Jennifer L. Spaziano, Esq.
MCDERMOTT, WILL & EMERY
2049 Century Park East, #3400
Los Angeles, CA 90067-3208

ATTORNEYS FOR: Gibson, Dunn & Crutcher

Carey B. Moorehead, Esq.
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER
1055 West Seventh Street, #2700
Los Angeles, California 90017

ATTORNEYS FOR: Melvin Rifkind and Rifkind, Pondel & Parson

\\continued\\

SERVICE LIST CONTINUED PAGE -3-

Martin C. Washton, Esq.
Rory M. Hernandez, Esq.
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, CA 90071

ATTORNEYS FOR: Gibraltar Officer/Director Defendants John Edmund Towle, III

KFNSELLA, BOESCH, FUJIKAWA & TOWLE
1901 Avenue of the Stars, Suite 700
Los Angeles, CA 90067

FORMER ATTORNEYS FOR: James R. Boyle, Warren P. Glupker and Richard M. Post

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN GLAVARIS AND PATRICIA GLAVARIS;
BENNY L. TOLLEY in their individual
capacities and on behalf of
all persons similarly situated
Plaintiffs

v.

HERBERT J. YOUNG, et al.,
Defendants

CASE NO. CV-90-6185 MRP

MEMORANDUM OF DECISION

FILED SEPTEMBER 10, 1992
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

On October 7, 1991, the Court took under submission the Motions to Dismiss under Fed. R. Civ. P. 12(b)(6) and 9(b) of defendants Richard M. Post ("Post"); James R. Boyle ("Boyle"); Dean W. Harrison ("Harrison"); Jerome Nussbaum ("Nussbaum"); Rifkind Pondel & Parsons, Melvin Rifkind, ("Rifkind"); William H. Dudley, Ernst & Whinney, Ernst & Young ("Ernst"); KPMG Peat Marwick, Alvin Kang ("Peat"); and Gibson, Dunn & Crutcher ("Gibson").[1/]

The Court has treated these motions as motions to dismiss under Rules 9(b) and 12(b)(6) except as to one issue. For the purpose of determining the date by which the plaintiffs should have discovered the alleged fraud, the Court has considered matters outside the pleadings[2/], as well as matters subject to judicial notice[3/], and treated

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[1/] Defendant Warren P. Glupker filed a motion to dismiss which was scheduled for hearing on April 6, 1992. The Court took this motion under submission as well.

[2/] The Court requested from both plaintiffs and defendants a copy of the Gibraltar Financial Corporation ("GFC") press release dated October 30, 1987. Plaintiffs, in addition, presented evidence of newspaper reports and other evidence relating to GFC's October 1987 disclosure of its losses.

[3/] There are additional references in this Memorandum to allegations and arguments made in actions filed in the Central District of California relating to the same events as those involved in this action. The complaints filed in several of these actions were submitted to the Court by various parties as part of the record. The Court also requested other files from the Clerk of the central District and has made reference to them in this Memorandum of Decision.

the motions as ones for summary judgment. Fed. R. Civ. P. 12(c). Having done so, the Court now grants in part and denies in part the motions of certain defendants and grants the motions of others in their entirety. Since this is the third complaint filed by plaintiffs and they have been given many opportunities both to plead and to argue their theories, legal and factual, further amendment will be permitted only as indicated below. Except as specifically indicated, all claims ordered dismissed by this Memorandum are dismissed with prejudice.

DISCUSSION

I. FACTUAL BACKGROUND

This class action was filed on November 16, 1990, alleging multiple claims under the federal securities laws and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., as well as supplemental state law claims against Gibraltar Savings[4/], directors and officers of Gibraltar Savings, and directors and officers of

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[4/] Gibraltar Savings is a wholly owned subsidiary of GFC and is currently under the control of the Resolution Trust Corporation ("RTC"). GFC is in bankruptcy proceedings and is not named in this suit. The term "Gibraltar" is used throughout their Second Amended Complaint without specification of whether the acts alleged were the acts of the parent or the subsidiary.

Gibraltar Financial Corporation ("GFC") [5/] and GFC's attorneys[6/] accountants[7/] and financial Public relations

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[5/] Herbert J. Young, Chairman, CEO, President of Gibraltar until 3/88.

James N. Thayer, Board member, President of Gibraltar as of 3/88.

Jay Janis, Board member, Chairman of Gibraltar as of 3/88.

John R. Williamson, Board member, CFO, Executive Vice President of Gibraltar.

Jerome Nussbaum, Executive Vice President, CFO of GFC and President and COO of Gibraltar Savings.

Michael W. Mooney, Treasurer, Executive Vice President, CFO of Gibraltar Savings.

Lynne Crawford, Senior Vice President and Controller of Gibraltar Savings, Vice President of Gibraltar Management of Properties, Inc. ("GMOP"); officer/Director of Gibraltar affiliates.

Linda K.S. Blount, Vice President-Investor Relations and Corporate Communications of Gibraltar.

Robert R. Sprague, Board member of Gibraltar

Houston I. Flournoy, Board member of Gibraltar.

Bernice Hutter, Board member of Gibraltar.

Melvin P. Spitz, Board member of Gibraltar.

Rafael E. Vega, Board member Of Gibraltar.

Richard M. Post, Senior Vice President-Real Estate of Gibraltar Savings.

James R. Boyle, Executive Vice President-Real Estate Lending of Gibraltar Savings.

Warren P. Glupker, Chief Appraiser of Gibraltar Savings.

Susan Rawlings, CPA, senior financial analyst in charge of accounting for real estate of Gibraltar Savings.

Dean W. Harrison, Senior Vice President, General Counsel and Secretary of Gibraltar Savings.

[6/] Gibson.

advisors[8/]. The class is defined as individuals who purchased GFC securities between January 1, 1986 and April 30, 1989 and all GFC shareholders who received GFC's Proxy Statements dated April 6, 1987 and April 8, 1988. The class representatives are John and Patricia Glavaris ("Glavaris") and Benny Tolley ("Tolley").

Plaintiffs allege that as a result of the actions of their officers and directors, GFC[9/] and its subsidiary, Gibraltar Savings, made false and misleading representations and failed to disclose to the public and to its shareholders material facts affecting GFC securities. Further, GFC's attorneys, accountants, and financial public relations advisors are alleged to have been not only negligent but reckless in the making and issuance of statements and reports concerning GFC. As a result, plaintiffs lost their investments in GFC securities. Since the plaintiffs' allegations cover such a long period of time and are not set forth in chronological order, a history of the events which culminated in the filing of this action is required for an understanding of the problems raised by the Second Amended Complaint.[10/]

[7/] Ernst; Peat, and Kenneth Leventhal & Co. and Richard Sprayregen, partner (dismissed with prejudice from action on July 29, 1991).

[8/] Rifkind.

[9/] As stated, for the most part, plaintiffs' allegations are made against both GFC and Gibraltar Savings, jointly, without differentiating between the two entities.

[10/] The Court has developed a time line which sets forth the key events important to the motions. See Appendix.

A central focus of the events involved here is the "Galleria",[11/] a commercial real estate property located in Metairie, Louisiana which was owned by Gibraltar Management of Properties, Inc. ("GMOP"), a wholly owned subsidiary of Gibraltar Savings. The project manager of the Galleria was Gibraltar Community Builders, Inc. ("GCBI")[12/]." In 1983, GCBI and GMOP formed Gibraltar Community Builders ("GCBI"), a California partnership, to develop real estate properties. In the partnership agreement, GMOP was referred to as the "financial partner" and GCBI as the "developer." By 1985, GFC's largest real estate investment was in GCB, and its largest real estate development project was the Galleria. More than $530 million was invested in GCB and the Galleria.

The events critical to the claims alleged here began in January 1986 when GFC published its 1985 Annual Report stating that the "outlook . . . in 1986 is favorable" and that the company expected continued asset growth and another successful year. The Form 10-K filed with the Securities and Exchange commission ("SEC") at that time stated that

> [Gibraltar's] real estate investments are carried at the lower of cost or net realizable value. Net realizable value is determined quarterly based on estimated sales

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[11/] In fact, the majority of the allegations of wrongdoing by defendants concern fraudulent representations and mismanagement of the Galleria and "other" real estate investments which are not specifically identified in the complaint. For example, in paragraph 76 of the complaint where plaintiffs list "fraudulent and false and misleading omissions," of the 45 subsections, at least 24 concern the Galleria and real estate investments. See Complaint at 90-103.

[12/] The three officers, directors and shareholders of GCBI were: Corey Patick, Hal Lurtsema, and Myron Stahl.

value less estimated expenses and carrying costs through completion and sale of the project. Estimated sales values are based on independent appraisals or comparisons with sales prices of similar properties. Estimates of expenses and carrying costs are based on historical experience adjusted for factors such as anticipated inflation [and] cost of funds.

Ernst audited GFC's 1985 financial statements[13/] and issued an opinion dated January 23, 1986 stating that they conformed with generally accepted accounting principles ("GAAP") applied on a consistent basis.[14/]

Some months later, in August 1986, Glavaris purchased shares of GFC common stock and GFC 9-1/4% convertible subordinated debentures due 2008 ("GFC 9-1/4"). In that same month, Peat replaced Ernst as GFC's auditor. In September 1986, it is alleged that GFC learned that an appraisal of the Galleria would reflect a loss in excess of $30 million. Upon learning of the probable appraisal figure, GFC, through defendant Nussbaum, is said to have cancelled the appraisal and failed to disclose this information about the Galleria. Glavaris made additional purchases of GFC 9-1/4 in October and December 1986.

In January 1987, Tolley purchased GFC 9-1/4 and

[13/] The financial statements are the consolidated statements of GFC and its subsidiaries, including Gibraltar Savings.

[14/] The 1985 financial statements and representations regarding the reporting of real estate also appeared in the April 7, 1986 Prospectus covering the offer and sale of Gibraltar Saving's 7-1/2% Convertible Subordinated Dentures due 2006 ("Gibraltar Savings 7-1/211) and the December 15, 1986 Prospectus covering the offer and sale of GFC's 13-7/8% Senior Subordinated Debentures due 2001 ("GFC 13-7/8").

shortly thereafter, GFC issued its year-end press release which reported "record earnings" for the year ending December 31, 1986 and a "50% dividend increase." Also, the 1986 Annual Report stated that "results for 1986 include provisions for loan losses of $34 million and losses on real estate operations of $33 million. As a result, there will be a substantial reduction in such provisions in 1987 and beyond and a positive effect on operating earnings."

In February 1987, Glavaris purchased additional GFC common stock and GFC 9-1/4. In that month, it is alleged that GFC was informed that a Los Angeles law firm, Dorman and Wheeler, was investigating claims of mismanagement against GFC's officers and directors arising out of the development of the Galleria. In March 1987, GFC issued its 1986 financials with an opinion by Peat stating that the financials conformed with GAAP applied on a consistent basis.[15/] In late February or early March of 1987, Corey Patick, Chief Executive Officer of GCBI, at a meeting at Gibraltar Savings' headquarters, threatened litigation against Gibraltar Savings because of its refusal to contribute the Galleria to GCB.[16/] Robert H. Bretz ("Bretz"), counsel for plaintiffs in this case, was present at

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[15/] Ernst's opinion dated January 23, 1986 was republished and included with the 1986 Annual Report to shareholders and Form 10-K.

[16/] Declaration of Martin C. Washton Filed In opposition to Plaintiff's Second Motion for Partial Summary Judgment in Neubronner v. Young at 17-18 (filed November 5, 1990) (deposition testimony of Dean W. Harrison taken October 20, 1990). These uncontradicted allegations and this testimony are cited for the purpose of examining whether Bretz's representations as to the necessity for discovery should be found persuasive.

that meeting.[17/] By March 1987, litigation had commenced in Metairie, Louisiana concerning the right to control and possession of the Galleria.[18/] On March 13, 1987, an action was filed in Stockton, California by GCBI against GMOP and Gibraltar Savings in which GCBI alleged that the failure of GMOP and Gibraltar Savings to contribute the Galleria to GCB constituted a breach of duty to the partnership. Bretz was counsel for the principal shareholders of GCBI in that case.[19/]

In April 1987, a second version of GFC's 1986 financials was issued and included with the Proxy Statement sent to the shareholders for the 1987 Annual Meeting of Shareholders. This version of the financials treated the Galleria as a long-term investment. At the Annual Meeting, the shareholders were asked to approve a retroactive agreement indemnifying GFC's officers and directors for any claims which might be brought against them for mismanagement, as well as any claims which might arise out of the acquisition of First State Bank of Florida ("FSBF"). The Proxy Statement for the Annual Meeting to be held in may contained a statement that the Board was not aware of any actions currently pending or threatened against any directors or officers of GFC who might become parties to the indemnity agreement. However, plaintiffs allege that the Proxy Statement failed to disclose that the Board was in fact aware of threatened litigation against members of GFC'S management who might become party to the indemnity agreement; there were two versions of the GFC 1986 financial statements; the Galleria and other real estate

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[17/] Id. at 18.

[18/] Id. at 19-20

[19/] Id. at 20-21

investments posed a threat of serious potential losses; and the Federal Home Loan Bank Board ("FHLBB") had voiced objections to acquisitions by GFC[20/] and required the execution of a Capital Maintenance Agreement and a limitation on the amount of dividends from Gibraltar Savings to GFC.

In May 1987, Glavaris purchased additional GFC 9-1/4.On May 14, 1987, a lawsuit was filed in the Central District of California for injunctive relief based on the unlawful solicitation of proxies for the 1987 Annual Meeting. Stahl v. Gibraltar Fin. Corp., No. CV 87-3147. Bretz represented the plaintiff in this lawsuit in which it was alleged that GFC had failed to disclose that a law firm, Dorman and Wheeler, had been investigating claims of mismanagement by GFC's officers and directors involving, among other things, the Galleria, and also that GFC was aware of threatened litigation against officers and directors who were potential beneficiaries of the indemnity agreement.[21/] Despite the filing of the Stahl case, the May 22, 1987 Annual Meeting was held and, at that meeting, Young stated that GFC was in sound financial condition and that its future prospects were favorable. During the summer of 1987, GFC secured the permission of the FHLBB to

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[20/] Plaintiffs allege that as a condition of Gibraltar savings, acquisition of Santa Clara Savings, GFC was required to enter into a Capital Maintenance Agreement with the FHLBB. However, this allegation is not related to the proxy statements, nor are any other facts alleged which indicate any wrongdoing by Gibraltar in connection with this acquisition. Complaint ¶ 76(42) at 102.

[21/] On July 14, 1989, this Court granted judgment for the defendants in Stahl on the ground of lack of standing to sue. On June 18, 1992, the Ninth Circuit reversed this Court's decision.

purchase FSBF for $116 million and Glavaris purchased additional GFC 9-1/4.

In October of 1987, it is alleged that the FHLBB told GFC that it found the institution to be in financial trouble with an unrealized loss of $500 million resulting from its substantial portfolio of fixed rate mortgage-backed securities.[22/] Though the parties may dispute the content of the communications with the FHLBB, they do not dispute that on October 30, 1987, the investment community was shocked by GFC's disclosure of a loss of $154.6 million in the third quarter ending September 30, 1987. This was one of the largest quarterly losses ever announced by a public thrift institution. GFC acknowledged the loss as resulting from commercial banking enterprises and high-risk real estate acquisitions, and stated in its press release:

> GFC has commenced a program to expedite the sale of real estate investments and has provided for anticipated losses on sale. . . This decision . . . required a $147.1 million third quarter writedown.[23/]

GFC suspended its quarterly dividend, its credit rating was lowered and it was forced to put up one of its principal assets, the MoneyCenter, for sale in order to raise capital. On November 2, 1987, The Wall Street Journal[24/] and New

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[22/] Plaintiffs allege that Gibraltar did not take steps to eliminate or reduce its exposure to a rising interest rate environment and thus suffered losses from these investments. This allegation is, at most, a claim of negligence by Gibraltar officials.

[23/] GFC Press Release (October 30, 1987).

[24/] David Hilder, Gibraltar Posts a Big Deficit for 3rd Quarter, Wall St. J., November 2, 1987, § 1, at 13.

York Times[25/] reported the news of these catastrophic losses and the price of GFC stock plummeted. Glavaris purchased common stock in GFC on November 4, 1987, almost immediately after this alarming report.

On November 17, 1987, a stockholders' derivative lawsuit was filed in the Superior Court of the State of California in LOS Angeles County for breach of fiduciary duty and breach of contract against GFC's management and accountants. Weinberger v. Gibraltar Fin, Corp., No.C668149. Further, commencing on November 23, 1987 and at various times thereafter, the following actions were filed in the Central District of California: Model Assocs., Inc.v. Gibraltar Fin, Corp., No. CV 87-7876; Lifshitz v.Gibraltar Fin. Corp., No. CV 87-8156; Winard v. Gibraltar Fin, Corp., No. CV 88-1101; Greenman v. Gibraltar Fin. Corp., No. CV 88-1912; Seidner v. Gibraltar Fin. Corn., No. CV 88-4551. On May 9, 1988, pursuant to stipulation of the parties, these actions were consolidated under the caption In re Gibraltar Fin. Corp. sec, Litig., Master File No. CV 87-7876 MRP (Bx). A Second Consolidated Amended and Supplemental Complaint was filed on May 1, 1989 which defined the class period as January 23, 1986 through March 31, 1989.[26/] Each of these lawsuits alleged

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[25/] Gibraltar Loss of $155 Million, N.Y. Times, November 2, 1987, at B1O.

[26/] The end date for the class period was extended from November 1, 1987 to March 31, 1989 based upon new allegations raised in the Second Amended Complaint, including that (1) additional losses from all of the activities previously disclosed had continued for each quarter through March 31, 1989, and (2) previously unidentified bond market investments led to losses commencing in the third quarter of 1987 for which defendants did not make timely and adequate disclosures.

misrepresentations and omissions by GFC, its officers and directors, as well as its accountants, regarding GFC's 1985 and 1986 financial reports and its real estate investments. The gravamen of the various claims against the defendants was that they had failed to make adequate provisions for losses and timely write-downs of commercial loans, real estate and bond investments; failed to make adequate provision for losses and timely write-down of loans and properties acquired in settlement of loans to their realizable value; and failed to timely and adequately disclose losses and the risky nature of GFC's investments.[27/]

By the end of 1987, plaintiffs allege that GFC suffered unreported losses attributable to the decline in market value of its portfolio of fixed rate mortgage-backed securities in excess of $300 million and that at that point its net worth consisted primarily of intangible good will. It is further alleged that in December 1987, GFC's management met with the FHLBB to discuss the FHLBB's concerns about the financial condition of the company, but that nevertheless, in January 1988, GFC issued a press release stating that it was in sound condition, that capital ratios of its savings and loan subsidiaries remained in excess of regulatory requirements, and that 1988 should be a profitable year.

In March 1988, Young, Williamson and Nussbaum retired, although plaintiffs allege that in fact these individuals were fired. Further, in that month, the 1987 GFC financial statements were issued with an opinion from

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[27/] On June 23, 1989, this Court certified a plaintiff Settlement Class solely for purposes of the stipulation, the settlement contained therein and judgment on July 28, 1989, John G. Glavaris filed a timely request for exclusion from the settlement class. Tolley did not file a request for exclusion. The settlement and final judgment of the action was entered on September 19, 1989.

Peat stating that they conformed with GAAP applied on a consistent basis. Plaintiffs allege no specific fraud with respect to these financials. At that time, GFC closed the MoneyCenter necessitating a $20 million write-off.

In April 1988, a Proxy Statement was sent to all shareholders. Plaintiffs allege that the statement did not disclose the claims brought against GFC'S management, the FHLBB criticisms of GFC's management, and the FHLBB's concerns with respect to the financial well-being of GFC.[28/] In May 1988, at the Annual Meeting, Thayer reported that GFC's condition had stabilized, no additional major surprises were expected, and GFC expected to make a profit by the fourth quarter of 1988. A Notice of Settlement, dated August 12, 1988 and issued by Gibson on behalf of the Special Committee,[29/] reported that the committee had not found any evidence of wrongdoing on the part of GFC's management. GFC settled the Weinberger shareholder derivative suit in September 1988.

By January 1989, GFC was publicly reported to be in an "unsafe and unsound" condition. The 1988 financial reports, issued in March 1989, showed a loss of $101 million. On March 10, 1989, the Mercatura Trust[30/] filed

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[28/] Plaintiffs allege no specific vote which was affected by these alleged omissions in the 1988 Proxy Statement.

[29/] This committee was established by Gibraltar to investigate the allegations of the Weinberger derivative action.

[30/] Neubronner is the trustee of the trust.

an action against Drexel Burnham Lambert.[31/] Mercatura Trust v.Drexel Burnham Lambert Inc., No. CV 89-1461. Bretz again represented the plaintiff in this action. In Mercatura Trust, plaintiff alleged insider trading based on non-public information concerning the Galleria. The period of insider trading was alleged to have ended on October 30, 1987 when GFC reported the real estate investment and loan losses of a quarter billion dollars.[32/] Plaintiff alleged in the Mercatura Trust case that after October 30, 1987 the inside information was "out." on March 30, 1989 the FSLIC was appointed conservator of Gibraltar Savings. Plaintiffs allege that GFC continued to deny any wrongdoing, even in the face of this action by the FSLIC. In April 1989, Gibson reconfirmed what was stated in the Notice of Settlement of Weinberger,

that the Special Committee found no wrongdoing by GFC's officers and directors.

[31/] In the current complaint, plaintiffs allege that Gibraltar Savings had purchased a substantial portfolio of "junk" bonds from Drexel Burnham Lambert and that one or more of Gibraltar's executives had received undisclosed compensation from these. Complaint ¶ 76(37) at 101. There are no facts pleaded to support this allegation. Furthermore, such an allegation, along with plaintiffs' general allegations of mismanagement, are derivative in nature since they result in injury to the corporation and therefore must be brought in the name of the corporation. See Stevens v. Lowder, 643 F.2d 1078, 1079-80 (5th Cir. 1981). Any relief based upon such alleged wrongdoing belongs to the RTC and thus, plaintiffs do not have standing in this action to assert such claims. See Leach v. FDIC, 860 P.2d 1266, 1269 (5th Cir. 1988), cert. denied, 491 U.S. 905 (1989).

[32/] Mercatura Trust Complaint at 7 1 24.

On June 2, 1989, another lawsuit was filed in the Central District against GFC and its officers, directors and accountants, among others, alleging violations of the federal securities laws and RICO, together with several supplemental state claims based on misrepresentations and omissions, as well as mismanagement by GFC and its officers, directors and accountants for the period January 1, 1986 through April 1, 1989. Neubronner, as Trustee for and on behalf of Mercatura Trust v. Young, No. CV 89-3377. In this lawsuit, Bretz, as attorney f or Neubronner[33/], characterized the October 30, 1987 losses reported by GFC as "catastrophic operating losses of approximately $250,000,000 (one quarter of a billion dollars!) attributable to the Company's prior real estate loan and investment activities. The Company's stock price dropped to approximately $3.[34/] Bretz further alleged that "management was aware of massive losses attributable to the Company's real estate loan and investment activities and portfolios aggregating approximately $250,000,000- which catastrophic and terminal losses were first Publicly reported on or about November 3, 1987 (based on GFC Managements' Press Release dated Friday October 30, 1987.[35/] (Emphasis added throughout.) As Neubronner himself stated in a declaration filed in the case:

> Mercatura Trust was still purchasing shares of GFC Common Stock, and had accumulated a position of approximately 1,028,000 shares of GFC Common Stock, in early November of 1987 when I personally first heard about GFC's horrible real estate losses of about U.S.

[33/] Neubronner was the largest single shareholder of GFC

[34/] Neubronner Complaint at ¶ 6.

[35/] Neubronner Complaint ¶ 31 (11) at 41-42 (emphasis added).

> $250,000,000 as announced by GFC and Gibraltar Savings in the U.S. on or about October 30, 1987.
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> I immediately caused Mercatura Trust to stop purchasing GFC stock after I first learned about these very large losses attributable to Gibraltar Savings' commercial and real estate investments.[36/]

The complaint in Neubronner also recited that "[i]n January of 1989, the Federal Home Loan Bank Board of San Francisco declared GFC to be in an 'unsafe and unsound' condition and effectively seized control and management of the Company's savings and loan business. . . . [By] April 3, 1989, the Wall Street Journal reported that the Government's takeover of Gibraltar confirms that GFC's shareholders have been 'wiped out'!"[37/]

A short time after the Neubronner case was filed, additional cases were brought in the Central District against GFC, Gibraltar Savings and related entities alleged to be involved in various ways in the Gibraltar losses. These cases include Neubronner v. Waldrop, No. CV 89-3529, and Gibraltar v FHLBB, No. CV 89-3489, both before Judge Keller in the Central District. These cases challenged the FSLIC's conservatorship of Gibraltar Savings and Gibraltar Savings Bank as unlawful. Bretz represented the plaintiffs in

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[36/] Declaration of Plaintiff D. Neubronner in Support of Notion for summary Judgment Against Gibraltar Savings and GFC officer/Director Defendants in Neubronner v. Young, at 5 (October 10, 1990).

[37/] Neubronner Complaint 7 at ¶¶ 13, 15.

each of these actions as well.[38/]

After these lawsuits were on file, on June 30, 1989, Glavaris purchased GPC 13-7/8.[39/] On July 28, 1989, Glavaris filed a request for exclusion from the settlement in the In re Gibraltar class action indicating that he was prepared to file his own action against GFC and its officers, directors and others. The In re Gibraltar action was settled and final judgment entered on September 19, 1989. On November 16, 1990, more than a year after Glavaris opted out of the In re Gibraltar class, this class action was filed

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[38/] Plaintiff Neubronner, through his attorney, Bretz, has made many inconsistent allegations concerning the condition of Gibraltar Savings in these various actions. For example, in Neubronner v. Young, plaintiff alleges that Gibraltar was in an unsafe and unsound condition allegedly due to the fraudulent mismanagement of Gibraltar. Many of the same allegations are raised in this action. However, in Neubronner v. Waldrop, plaintiff alleges that although the "reason stated for the seizure . . . of Gibraltar Savings and Gibraltar Savings Bank by the government was . . . that Association[s] had incurred substantial dissipation of its assets and earnings due to violations of law, rules, regulations and to unsafe and unsound practices and is in an unsafe and unsound condition to transact business," the Associations are "not in an unsafe and unsound condition to transact business." Waldron Complaint 2-3 at ¶ 3, 4-5 at ¶¶8-9 (emphasis added). In fact, plaintiff alleges in Waldrop that "the seizure of . . . (the Associations) by the government agencies was unlawful." Waldrop complaint, 6 at ¶ 14.

[39/] Neither Glavaris nor Tolley purchased Gibraltar Savings securities during the class period; they only purchased GFC securities. Moreover, this purchase is outside the class period which ends on April 30, 1989.

with Glavaris and Tolley as class representatives and Bretz as the attorney for the class.

As this brief chronology demonstrates, litigation involving GFC's affairs has been going on for a long time, and GFC's investment in the Galleria has been a central focus, in one way or another, of most of that litigation. As the chronology also shows, Bretz has been intimately involved in litigation arising out of these problems since early 1987, and his involvement with GFC began with a controversy over the Galleria. Therefore, the protestations he has made concerning his inability to plead a coherent actual theory because of a lack of discovery must be viewed with some degree of skepticism by the Court.

II. FEDERAL SECURITIES VIOLATIONS

A. Section 10(b) Claim

To state a claim under § 10(b), a plaintiff must allege that in connection with the purchase or sale of a security, the defendant, acting with scienter, made a false material representation or omitted to disclose material information that defendant owed a duty to plaintiff to disclose, upon which plaintiff relied and which caused plaintiff injury. Cox v. Eichler, 765 F. Supp. 601 (N.D. Cal. 1990).[40/]

[40/] Section 10(b) of the Securities Exchange Act of 1934 U.S.C. § 78j(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) To use or employ, in connection with the purchase or sale of any security registered on a

1. Analysis of fraud On the market theory

It is obvious that the effect on this case of prior litigation of the magnitude outlined above poses a serious problem of analysis for the Court. This problem is exacerbated by the way in which the plaintiffs have framed the pleading now before the Court. The prerequisites for the establishment of a class action are that "there are questions of law or fact common to the class" and "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a). Thus, the class period in an action based on § 10(b) must be framed in such a way that all members of the class are similarly situated with respect to the misrepresentations or

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> national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule lOb-5 of the Securities Exchange Commission, 17 C.F.R. § 240.10b-5, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

omissions alleged. This requirement of commonality becomes most critical when applied to the element of reliance. Here, plaintiffs have sought to carry their burden of proving reliance by alleging that the misrepresentations and omissions claimed constituted a "fraud on the market."

The fraud on the market theory was first accepted by the Ninth Circuit in Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976). The "theory is based on two assumptions: first, that in an efficient market, the price of the stock will reflect all information available to the public, and second, that an individual relies on the integrity of the market price when dealing in that stock." Levinson v. Basic Inc., 786 F.2d 741, 750 (6th Cir. 1986), vacated on other grounds, 485 U.S. 224 (1988) (citations omitted). Thus, if the market is deprived of material information or if the market reflects misstatements or omissions of material information, the integrity of the market is compromised and the market price is artificially inflated or deflated. Id. The theory then assumes that an investor trading in the market is relying on its integrity and therefore indirectly relying on the material misrepresentation or omission then affecting the market price. In a § 10(b) case then, a rebuttable presumption is created[41/] that the

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[41/] The defendants may rebut the presumption created in a number of ways including a showing "that an individual plaintiff purchased despite knowledge of the falsity of a representation, or that he would have, had he known of it. "Blackie, 524 F.2d at 906. Looking at the history of Glavaris trading in GFC securities, one could conclude that Glavaris, in fact, was not relying on the publicly available information reflected in the market price. Glavaris purchased GFC securities only days after the announcement of GFC's catastrophic losses and three months after the Gibraltar Savings was placed in conservatorship.

plaintiff relied on the material misrepresentation or omission and proof of individual reliance is not required to establish a prima facie case. Id. See also Basic, Inc. v. Levinson, 485 U.S. 224 (1988); In re Convergent Technologies Sec. Litig., 948 F.2d 507, 512 n.2 (9th Cir. 1991).[42/]

This presumption of reliance is based on the notion that "'the market is interposed between seller and buyer and, ideally, transmits information to the investor in the processed form of market price. . . . The market is acting as the unpaid

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[42/] With regard to proof of reliance based on a fraud on the market theory, the Ninth Circuit has chosen not to distinguish between a misrepresentation and an omission. In Little v. First California Co., 532 F.2d 1302 (9th Cir. 1976), the Ninth Circuit commented that

> [t]he categories of 'omission' and misrepresentation' are not mutually exclusive. All misrepresentations are also nondisclosures, at least to the extent that there is a failure to disclose which facts in the representation are not true. Thus, the failure to report an expense item on an income statement, when such a failure is material . . . can be characterized as (a) an omission of a material expense item, (b) a misrepresentation of income, (c) or both.

Particularly when multiple misrepresentations and omissions are intertwined, as they are here, the task of differentiation is both difficult and unnecessary. As the Third Circuit in Sharp v. Coopers & Lybrand, 649 F.2d 175, 188 (3d Cir. 1981), cert. denied, 455 U.S. 938 (1982), stated

> (a) strict application of the omission-misrepresentations dichotomy would require the trial judge to instruct the jury to presume reliance with regard to the omitted facts, and not presume reliance with regard to the misrepresented facts. Although this resolution would have great appeal to graduate logicians in a classroom, we are not persuaded to adopt it for use in a courtroom.

agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price.' . . . An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price.', Basic, Inc., 485 U.S. at 244, 247 (quoting In re LTV Sec. Litig., 88 F.R.D. 134, 143 (N.D. Tex. 1980) (emphasis added)). Thus, the investor is indirectly relying on all of the publicly available information which is then reflected in that market price. Once the truth is publicly disclosed, the truth is reflected in the market price in the same manner the misrepresentations were reflected in the price before the truth was revealed. Since an investor who buys or sells relying on the market price after the disclosure is relying on true information, he can no longer claim reliance on the previous misrepresentations or omissions.

The class period here, as defined--January 1, 1986 through April 30, 1989--is exceptionally long for a § 10(b) claim based on a fraud on the market theory. An impersonal,well-developed securities market is constantly being supplied with information concerning public companies, and, given the requirements of reporting and disclosure imposed on these companies, it is difficult to imagine a situation where the same fraud could affect all buyers of a publicly traded security in a three year period. Nevertheless, the complaint in this case attempts to claim a kind of "floating fraud", one alleged to have been perpetuated by the inadequacy of each and every disclosure made by GFC over a three year period of time. Put simply, the plaintiffs' theory is that no disclosure made by GFC was sufficient to correct the effect on the market of any past fraud over the entire three year period. This kind of

renders analysis of time sensitive issues like the statute of limitations, causation and reliance difficult, if not impossible. Although this Court is also highly critical of this pleading technique, plaintiffs have used it here and the Court is therefore forced to make its analysis of these time-sensitive issues on the assumption that a three-year fraud on the market theory is viable.

Three inquiries must be made in analyzing the time sensitive issues in a § 10(b) claim based on fraud on the market: (1) when did the plaintiffs buy or sell the securities; (2) what were the misrepresentations or omissions alleged to have constituted the fraud on the market at that time; and (3) when was there a disclosure of facts--from whatever source--sufficient to correct the effect on the market of the-fraud created by those particular misrepresentations or omissions? The answer to the third inquiry sets the date on which plaintiffs are deemed to be on notice that they have traded in a market tainted by the particular misrepresentations or omissions alleged to be fraudulent. It also sets the date after which no market participant can claim to have relied on these particular fraudulent misrepresentations or omissions in entering into a transaction.

In making the requisite inquiries in this case, two dates are obviously the most significant: November 3, 1987,

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According to plaintiff's theory, the SEC investigation and suit never exposed the root of Home-Stake's fraudulent operation. They claimed further the resulting Settlement and Rescission offer not only incorporated the continuing fraud but also clothed subsequent activities in the mantle of legitimacy. Anixter v. Home-Stake Production Co., 939 F.2d 1420, 1431 (loth Cir. 1991), cert. granted sub nom., Dennier v. Trippet, 112 S. Ct. 1658 (1992) (judgment vacated and case remanded for further consideration in light of section 27 of the 1934 Act).

In making the requisite inquiries in this case, two dates are obviously the most significant: November 3, 1987, when the financial press responded in shock to the October 30, 1987 announcement of GFC's catastrophic losses, and April 3, 1989, when the public announcement had been made of the March 30, 1989 appointment of the FSLIC as conservator for Gibraltar Savings. These two dates were of such overwhelming significance to the market for GFC securities that it is impossible to understand this or any other case involving GFC securities without reference to them. Thus, there are three relevant periods of time for the alleged class members in this case: Period 1--January 1, 1986 (when the class begins) through November 3, 1987 (when the catastrophic losses had been fully publicized); Period 2--November 4, 1987 through April 3, 1989 (when the takeover of Gibraltar Savings by the FSLIC had been fully publicized'; and Period 3--April 4, 1989 through November 16, 1990.[44/] Using the fraud on the market theory, the three relevant inquiries for each of these three periods must be analyzed in the following way:

a. Period 1: January 1, 1986 through November 3, 1987

i. Who bought GFC securities?

Glavaris and Tolley purchased GFC securities in this period.

ii. What was the alleged fraud on

[44/] For purposes of analysis, the Court has extended the class closing date of April 30, 1989 to the date of the filing of this action in order to cover the period in which plaintiff allege transactions in GFC securities.

ii. What was the alleged fraud on the market?

(a) GFC represented that its general condition and outlook was positive when in fact the company was unsound. It also misrepresented that there were record earnings for year-end 1986.

(b) In its 1985 and 1986 financial statements, GFC misrepresented the method by which its real estate investments were treated. It also failed to disclose that it had cancelled one appraisal of the Galleria and that no other appraisals had been sought or obtained.

(c) GFC and its accountants represented that GFC's 1985 and 1986 financial statements conformed with GAAP, when they did not.[45/]

(d) GFC reported that the October 30, 1987 losses were incurred in the third quarter of 1987 when in fact they were incurred over the previous two years. [46/]

[45/] This general allegation is not sufficiently specific to state a claim for securities fraud under Rule 9(b). The allegation of fraud must indicate what item of the financials did not conform with GAAP and why. Schneider v. Traweek, 1990 WL 169856 (C.D. Cal. 1990) (plaintiff may not recite laundry list of various reporting standards and then allege all were violated). The only allegations which are sufficiently specific relate to the representations as to the Galleria and other real estate investments referred to in the 1985 and 1986 financials

[46/] This supposed misrepresentation is immaterial. Although plaintiffs argue that even this disclosure was a misrepresentation because the losses actually occurred between 1985 and September 1987 and Young stated that GFC was stronger for writing off the loss

iii. When was there a public disclosure sufficient to correct the effect of that fraud on the market?

Between October 30, 1987 and November 3, 1987, GFC publicly disclosed massive losses for the third quarter of 1987 and suspended dividends, both as a result of real estate investments and commercial banking enterprises. Further, the price of GFC stock plummeted. These events were reported throughout the country. There can be no doubt that these reports placed any reasonable person on notice of potential fraud in the earlier statements made concerning its real estate investments and the general outlook for the company. It is obvious that if these reports did not totally destroy the market in GFC securities, they quite clearly corrected any falsely affirmative affect created by the earlier statements made by the company. In fact, in plaintiff's motion for partial summary judgment in Neubronner v. Young, plaintiff argued that an action under § 10(b) had been established against Gibraltar, its management and accountants because plaintiff had purchased stock in Gibraltar [d]uring the period following such [false] statements (January 21, 1987) and the time the truth was ultimately revealed (October 30, 1987).[47/] (Emphasis added.)

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and it would not happen again, these two "facts" are immaterial. In Bretz's own words, the loss reported on October 30, 1987 was "catastrophic" and regardless of any inaccuracies in the disclosure, it was certainly sufficient to place a reasonable person on notice of prior misrepresentations as to these same subjects.

[47/] Plaintiff's Motion for Partial Summary Judgment Against Young and GFC for Section 10(b) Cause of Action in Neubronner v. Young, at 23 (filed Feb. 13, 1990) (emphasis added). See also Plaintiff's Reply to Defendant Young's Opposition to Plaintiff's

Certainly, as to any actionable fraud alleged during period 1, the market had received sufficient information by November 3, 1987 to place participants in it on notice of the past fraud and to dissipate whatever affirmative effect that fraud had on the market. At the very least, it is safe to say that anyone trading in GFC securities after 20 November 3, 1987 was not trading in the same market as the one that existed prior to that date, nor was any trade made on the same market information.

b. Period 2: November 4, 1987 through April 3, 1989

i. Who bought GFC securities?

Although plaintiffs' counsel has stated that he has other representative plaintiffs who bought GFC securities throughout the class period available to be joined in this case, Glavaris and Tolley purchased no GFC securities in this period.

ii. What was the alleged fraud on the market?

(a) GFC represented that its general condition was sound when in fact it was not. It also misrepresented that the capital ratios of GFC's savings and loan subsidiaries remained in excess of regulatory

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Motion for Partial Summary Judgment in Neubronner v. Young, at 13 (filed May 1, 1990) ("In October of 1987 Gibraltar Savings received the Dupree Felts appraisal on the Galleria (dated October 1, 1987) and provided a copy to the FHLBB. . . . October 30, 1987, GFC publicly reported losses attributable to GFC and Gibraltar Savings' commercial real estate loans and investments . . . . 11) (emphasis added).

requirements, that GFC's condition had stabilized and that there were no major surprises expected.

(b) GFC and its accountants represented that GFC's 1987 financial statements conformed with GAAP, when in fact they did not.[48/]

(c) On November 11, 1987, GFC announced its plans to sell-the MoneyCenter, however, it ultimately wrote off the MoneyCenter for $20 million.[49/]

(d) GFC failed to disclose that by the end of 1987, it had suffered unreported losses attributable to the decline in market value of Gibraltar's portfolio of fixed rate mortgage-backed securities in excess of $300 million.

(e) Gibson represented that the Special Investigative Committee found no wrongdoing by GFC management.[50]

[48/] This general allegation is not sufficiently specific to state a claim for securities fraud under Rule 9(b). &U surra note 45.

[49/] This allegation does not allege facts which indicate that this statement was fraudulent. That Gibraltar ultimately had to write off the MoneyCenter, several months later, does not establish an inference that at the time this statement was made it was false.

[50/] There are no facts pleaded to demonstrate that the statements were in fact false. Plaintiff does not allege that the Special Investigative Committee found wrongdoing by Gibraltar management and failed to report it.

iii. When was there a public disclosure sufficient to correct the effect of that fraud on the Market?

In the period from January, 1989 through April 3, 1989, Gibraltar was publicly reported to be in unsound financial condition, losses of $101 million for 1988 were announced, and on March 30, 1989, the FSLIC was appointed conservator of Gibraltar. Thus, as to any fraud alleged during period 2, the market had received sufficient 22 information by April 3, 1989 to place participants in it on notice of the alleged past fraud and to dissipate any affirmative effect that fraud had on the market. In any event, the market after April 3, 1989 certainly was not the same market as the one that existed prior to this date.

c. Period 3: April 4, 1989 through November 16, 1990

i. Who bought GFC securities

Glavaris purchased GFC stock after the class period ends on April 30, 1989.

ii. What was the alleged fraud on the market?

Gibson reasserted the same statement it made in September of 1988 that the Special Committee found no wrongdoing by GFC management.[51/]

[51/] See supra, note 50.

iii. When was there a public disclosure sufficient to correct the effect of that fraud on the market?

The fraud alleged in this period is simply the repetition by Gibson of its prior statements from September 1988 rather than any new misrepresentation or omission. Assuming the truth of these allegations, this fraud was the subject of public disclosure in period 2. Thus, its impact on the market is immaterial. By the beginning of period 3, anyone trading in GFC securities had already been advised of the collapse of the company and, presumably, the investors in the market knew that someone had to be responsible for it.

d. Summary analysis of reliance on fraud on the market theory

Without analyzing the precise state of the market on any one given day, several conclusions can be drawn from the prior discussion. The first is that · plaintiffs who purchased GFC securities in period 1 can claim reliance on fraud existent in the market in period I only. In this period, there are representative plaintiffs who bought, there is fraud alleged and, giving plaintiffs the best of the argument, the market affected by the fraud was not fully corrected until November 3, 1987. Next, plaintiffs who purchased GFC securities in period 2 can claim reliance on fraud existent in the market in period 2 only. However, in this period, no plaintiff bought and there is therefore no class representative who can be said to have relied on any fraud then existent in the market. Perhaps some other plaintiff might be in a different position, but there is no such plaintiff in this case at the 22 present time. Finally, plaintiffs who purchased GFC securities in period 3 can claim reliance on fraud existent 24

in the market in period 3 only. However, the fraud alleged 25 in this period is merely a reassertion of a statement to which the market had already reacted in period 2, the effect 27 of which had been dissipated by the end of that period. 28 Anyone buying after the FSLIC took over Gibraltar Savings can hardly have been buying in a market newly tainted by 3 Gibson's fraudulent reassertion of its prior opinion. The reassertion is simply immaterial since plaintiffs have alleged no actionable fraud in period 3, plaintiffs can claim no reliance on fraud in period 3.

2. Causation

The "in connection with" language of § 10(b) is the basis for the requirement of causation in a claim under the section. A transactional nexus must be established between a specific purchase or sale of a security and the alleged fraud. Raschio v. Sinclair, 486 F.2d 1029 (9th Cir. 1973); see also Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 754-55 (1975).

Among the factors to be considered in analyzing the "in connection with" requirement are "the degree of proximity between the securities transaction and the claimed fraud" and "whether there was a causal connection between the fraud and the securities transaction." In re Financial Corp. of America Shareholder Litig., 796 F.2d 1126, 1130 n.4 (9th Cir. 1986) (citing Buffo v. Graddick, 742 F.2d 592, 596 (11th Cir. 1984)). Plaintiff must establish that the fraud caused the plaintiff to engage in the transaction (transaction causation) and that the fraud caused the economic harm (loss causation). Id. at 1130 (citing Bennett v. United States Trust Co., 770 F.2d 308, 313 (2d Cir. 27 1985), cert. denied, 474 U.S. 1058 (1986)). Obviously then, the fraud must have actually occurred before the transaction so that it can be said to have affected the market in which the transaction was effectuated.

effectuated. Proof of fraud occurring after the plaintiff's transaction will not satisfy the "in connection with" requirement.

a. Transaction causation

To establish transaction causation plaintiffs must show that the fraud caused them to enter into the particular transactions involving GFC securities. In fact, "(transaction causation) is another way of describing reliance." Harris v. Union Elec. Co., 787 F.2d 355, 366 (8th Cir.1986), cert. denied, 479 U.S. 823 (1986); see also Basic, Inc., 485 U.S. at 243 ("Reliance provides the requisite causal connection between defendant's misrepresentations and a plaintiff's injury."). As discussed above, the "fraud on the market theory rests on the assumption that there is a nearly perfect market in information, and that the market price of stock reacts to and reflects the available information." Peil V. Speiser, 806 F.2d 1154, 1161 n.10 (3d Cir. 1986). The theory is that the investor is indirectly relying on the publicly available information which is reflected in that market price. Once the fraud is disclosed publicly, the market "reacts to and reflects" the true information and investors purchasing after the disclosure can no longer claim that the fraud caused them to purchase the securities. See Basic, Inc., 485 U.S. at 249 ("[I]f, despite petitioners' allegedly fraudulent attempts to manipulate market price, news of the merger discussions credibly entered the market and dissipated the effects of the misstatements, those who traded Basic shares after corrective statements would have no direct or indirect connection with the fraud.). Thus, the fraud must not only have before the Plaintiffs transaction, it also must not have been before the transaction. Plaintiffs in this case can establish no transaction causation as to fraud disclosed before they purchased the GFC securities.

b. Loss causation

To establish loss causation, plaintiffs must show that the fraud caused the economic harm they suffered. "Put simply, loss causation requires that the is 'damages [of the plaintiff] must be the direct result of the misrepresentations or omissions.'" In re Fortune Sys. Sec. Litig., 680 F. Supp. 1360, 1365 (N.D. Cal. 1987) (quoting In re Washington Public Power Supply Sys., 650 F. Supp. 1346, 1353 (W.D. Wash. 1986)). This element is satisfied "only if the misrepresentation [or omission] touches upon the reasons for the investment's decline." Id. (quoting Huddleson v. Herman & Maclean, 640 F.2d 534, 549 (5th Cir. 1981)). Intervening causes may thus break the chain of causation. Id. In this case, the loss causation chain is broken once the truth is publicly revealed. Thus, if plaintiffs purchased Gibraltar stock after the disclosure of the truth, the fraud is too attenuated to the purchase. Although there may well have been fraud, it cannot have had any effect on plaintiffs' transactions because the price of the securities already would have been adjusted to take account of the disclosure of the truth.

To establish loss causation, plaintiffs must demonstrate that they purchased the securities after the alleged fraud and before the disclosure of the truth, at a time when the price of GFC securities was inflated as a result of the fraud, that the truth was later disclosed, and that, as a result, the price of the securities dropped, causing then economic loss. Plaintiffs in this case can establish no loss causation as to any fraud disclosed before they purchased GFC securities.

c. Summary of causation

The requirements of loss and transaction causation each period can be analyzed as follows: Plaintiffs who purchased GFC securities in period 1 can claim causation with respect to fraud existent in the market in period 1 only. In this period, there are representative plaintiffs who bought GFC securities, there is fraud alleged and, giving plaintiffs the best of it, the fraud continued to affect the market until November 3, 1987 when the truth was disclosed. Plaintiffs who purchased GFC securities in period 2 can claim causation with respect to fraud existent in the market in period 2 only. However, in this period, no class representative bought GFC securities and, as a consequence, there is no plaintiff who could establish that fraud then existent in the market caused that plaintiff either to enter into a transaction or sustain a loss. Perhaps some other potential plaintiff might be in a different position but no such class representative is in the case now. Plaintiffs who purchased GFC securities in period 3 can claim causation with respect to fraud existent in the market in period 3 only. However, the fraud alleged 8 in this period is merely a reassertion of statements to which the market had already reacted in period 2. The effect of these statements had been dissipated by the disclosure of the truth occurring by the end of that period. Anyone buying GFC securities after the FSLIC took over Gibraltar Savings can hardly have been buying in a market newly tainted by Gibson's fraudulent reassertion of its prior opinion. As stated, the reassertion is simply immaterial. Since plaintiffs have alleged no fraud other than the reassertion in period 3, no causation can be established as to this period either.

3. Statute of limitations

In October 1991, all defendants argued in their motions to dismiss that the statute of limitations for federal securities fraud as defined in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991), and applied retroactively pursuant to James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991), controlled this action and that plaintiffs' federal securities claims were therefore time-barred. Earlier, the Court had indicated its agreement with this position. However, Public law No. 102-242, which became effective on December 20, 1991, included a provision which amended the Securities Exchange Act of 1934 ("the 1934 Act") by adding a new Section 27A following Section 27, U.S.C. § 78aa. This new section provides, in part, as follows:

> The limitations period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.[52/]

Since this action was filed in 1990, Lampf does not apply. Therefore, the limitations period defined in the Ninth Circuit as applicable to § 10(b) claims prior to Lampf controls.[53/]

[52/] Pub. L. No. 102-242 , sec. 476, 105 Stat. 2236 (1991).

[53/] Recently, Judge Legge in the Northern District of California held that Section 27A is unconstitutional on the grounds that it "violates the constitutional separation of powers between the judicial and legislative branches." In re Brichard See. Litig., No. C-87-2987-CAL at I (Mar. 27, 1992). To summarize that decision, the court found that with respect to Lampf, section 27A(a) "direct[s] the

Prior to Lampf, the Ninth Circuit borrowed California's three-year statute of limitations for fraud, Cal. Civ. Proc. Code § 338 (d)[54/], in actions based on § 10(b) Davis v. Birr, Wilson & Co., 839 F.2d 1369, 1369-70 (9th Cir. 1988). "Although state law governs the length of the limitations period, federal law controls the point at which the statute commences to run." Volk v. D.A. Davidson & Co., 816 F.2d 1406 (9th Cir. 1987) (citing SEC v. Seaboard Corp., 677 F.2d 1301, 1309 (9th Cir. 1982)). "The statute of limitations begins to run when the plaintiff has actual knowledge of the fraud or knowledge of facts sufficient to put a reasonable person on notice." Davis, 839 F.2d at 1370. The time of accrual for the limitations period here is dependent upon when the truth regarding the particular fraudulent misrepresentation or omission was publicly disclosed such that a reasonable person would be on notice of the alleged fraud. Recently, the Ninth Circuit in Nevada Power Co. v. Monsanto Co., 955 F.2d 1304 (9th Cir. 1992), reiterated that "when the plaintiff discovered or should have discovered the fraud with the exercise of reasonable

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adjudicative process without changing (the) substantive or procedural rule" announced in Lampf, Id. at 17; and section 27(A)(b) further "upset[s) the final judgments of either the Supreme Court or the lower federal courts" in contravention of the constitution. Id. at 20. Moreover, with respect to Beam, section 27(A) changes the constitutional decision on retroactivity announced in Beam, thus contravening the Supreme Court's judgment on questions of constitutional interpretation." Id. at 31. Without expressing an opinion on this recent decision, this Court declines to decide this action based upon the unconstitutionality of section 27A.

[54/] Cal. Code Civ. Proc. 338(d) states that "[a]" action for relief on the ground of fraud (must be brought within three years.] The cause of action in that case is not deemed to have accrued until discovery, by the aggrieved party, of the facts constituting fraud or mistake."

diligence . . . is usually a question for the trier of fact." Id. at 1308 (quoting General Bedding Corp. v. Echeyarria, 947 F.2d 1395, 1397 n.2 (9th Cir. 1991). Nevertheless, "[r]easonable diligence is tested by an objective standard, [citation omitted] and when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct, the issue may be decided on summary judgment." Davis, 839 F.2d at 1370 (quoting Kramas v. Security Gas & oil, Inc., 672 F.2d 766, 770 (9th Cir.), cert. denied, 459 U.S. 1035 (1982); accord Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873, 877 (9th Cir.), cert. denied, 469 U.S. 932 · (1984).

Viewing the uncontroverted facts of the case against the plaintiffs' theory of it, the Court concludes that there is "uncontroverted evidence [which] irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct" within clearly definable time frames. Following the analysis set out above, the statute of limitations on the §10(b) claim based on the fraud alleged in period 1 started to run no later than November 3, 1987, when Gibraltar's catastrophic losses were publicly 19 announced. This action was filed on November 16, 1990, more than three years later. Thus, the § 10(b) claim arising from fraud alleged in period 1 is time-barred.[55/]

A reasonable person would have been on notice of the fraud alleged in period 2 no later than April 3, 1989, when the public announcement of the appointment of the FSLIC as conservator for Gibraltar was made. Thus, the statute of limitations on the § 10(b)-claim based on fraud in

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[55/] The three-year statute of limitations applies as well to the common law fraud claim. Cal. Code Civ. P. § 338(d). Thus, to the extent the state law fraud claim arises from fraud alleged to have occurred during period 1, it is time-barred.

period 2 started to run on that date. Since both December 1987, the time when the period 2 fraud is alleged to have commenced, and April 3, 1989, the date on which a reasonable person would have been on notice of that fraud, are within the three years preceding November 16, 1990, the § 10(b) claim for fraud alleged during period 2 is not time-barred. to Similarly, any § 10(b) claim for fraud alleged during period 3 is also not time-barred.

4. Conclusion: All 10(b) claims must be dismissed

No representative plaintiff has stated a viable claim under § 10(b). Period 1 purchasers of GFC securities can show reliance and causation with respect to the fraud alleged in period 1 only. However, since the claims are time-barred, the § 10(b) claims of purchasers of GFC securities in period I are not viable. Period 2 purchasers can show reliance and causation with respect to the fraud alleged in period 2 only. However, since no class representative made a purchase of GFC securities in period 2, they can make no § 10(b) claims for this period.[56/] Period 3 purchasers can show reliance and causation with respect to the fraud alleged in period 3 only. However, since no actionable fraud is alleged to have occurred in period 3, plaintiffs can establish

no § 10(b) claims for this period. All § 10(b) claims against

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[56/] The class representatives GFC securities during period 2. Since the theory relied upon by plaintiffs is that the alleged misrepresentations and omissions by defendants had the effect of erroneously inflating the value of GFC securities, plaintiffs can claim no damages based on the sale of GFC securities during any period.

no § 10(b) claims for this period. All § 10(b) claims against all defendants must be dismissed.[57/]

B. PROXY FRAUD CLAIM

1. Statute of Limitations

The proxy fraud violations alleged under 10 § 14(a) of the 1934 Act and Rule 14a-9 are based on misrepresentations and omissions in the 1987 and 1988 Proxy Statements. For the most part, these misrepresentations and omissions relate to GFC's general financial condition and to its real estate investments, as well as to the FHLBB's concern about the use by GFC of Gibraltar Savings' cash to pay GFC's public debt and dividends. By November 3, 1987, sufficient facts had been disclosed with respect to any misrepresentations and omissions in the 1987 Proxy Statement relating to GFC's financial condition, its real estate investments and the FHLBB's concerns about these matters to cause the statute of limitations to begin to run on claims arising from them. A holder of GFC securities who had been defrauded by

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[57/] For purposes of explanation, reference should be made to the description of the alleged fraud, purchases, and dates of disclosure in the Appendix.

The elements of aiding and abetting are: (l) the existence of an independent primary wrong, (2) actual knowledge by the aider and abettor of the wrong and of his or her role in furthering it, and (3) substantial assistance in the wrong." Hokama v. E.F. Hutton & Co., 566 F. Supp. 636, 641 (C.D. Cal. 1983) (citing Harmsen v. Smith, 693 F.2d 932, 945 (9th Cir. 1982), cert. denied sub nom. Smith v. Harmsen, 464 U.S. 822 (1983)). Since the underlying section 10(b) action is dismissed, there is no independent primary wrong and the aiding and abetting claim under section 10(b) is also dismissed.

statements in the 1987 Proxy Statement as to these matters was placed on notice of the falsity of them when GFC's catastrophic losses were publicly announced and commented upon between October 30 and November 3, 1987. Thus, any claim under § 14(a) predicated on allegations of misrepresentations or omissions in the 1987 Proxy Statement concerning GFC's financial condition and its real estate investments, as well as the FHLBB's concerns about Gibraltar savings, is now time-barred. Davis v. Birr, Wilson &Co., 839 F.2d 1369, 1369-70 (9th Cir. 1988).[58/]

The time-bar created as a result of the notice afforded by the October 30-November 3, 1987 disclosures would, of course, only apply to GFC's financial condition, its real estate investments and the FHLBB's concerns, not to claims based on misrepresentations and omissions concerning other matters. However, the Stahl lawsuit filed on May 14, 1987, also has a significant impact on the statute of limitations issue. One of the misrepresentations alleged as a basis for the § 14 (a) claim is that with respect to the indemnity agreement included in the 1987 Proxy Statement, GFC stated that it was not aware of any pending or threatened claims against GFC management, whereas in fact it knew of such claims. These identical allegations were made in the Stahl

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[58/] This Court has not found any Ninth Circuit case which conclusively establishes that Cal. Civ. Proc. Code § 338(d) applies to section 14(a) claims. However, since a Section 14(a) claim also sounds in fraud, this Court applies the same statute of limitations for Section 14(a) claims as it does for Section 10(b) claims.

See Ceres Partners v. Gel Assoca., 918 F.2d 349, 353 (2d Cir. 1990 (acknowledging that "ordinarily the same period of limitations governs actions under § 10(b) and 14.11); Roberts v. Magnetic Metals Co., 611 F.2d 450, 452 (3d Cir. 1979) (applying statute of limitations from state law to § 14(a) action).

lawsuit and the existence of Stahl must certainly have been sufficient to put a reasonable shareholder on notice as early as May 1987 of this fraudulent misrepresentation in the Proxy Statement. Once the lawsuit was filed, the truth was out. In this regard, the Court has not tried to analyze the treatment the financial press gave the filing of the Stahl lawsuit and the disclosure at that time of the allegations contained in it. Such disclosures would no doubt merely reinforce the conclusion the Court has already reached. Thus, the § 14(a) claim based on the statements made regarding pending or threatened litigation is barred by the statute of limitations. Finally, although the statute of limitations is obviously not a bar to any claim based on misrepresentations and omissions in the 1988 Proxy Statement, there do not appear to be new allegations of misrepresentations or omissions in that material. The Court is left to wonder what that claim is all about.

2. Failure to state a claim

A claim under § 14(a) requires that the plaintiff establish that the proxy statements were both materially false and misleading and that they caused the plaintiffs' loss. Herzog v. Russell, 483 F. Supp. 1346, 1353 & n.3 (E.D.N.Y. 1979), see also Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 381-84 (2d Cir. 1974), cert. denied, 421 U.S. 976 (1975). Plaintiff must plead and prove both that material misstatements or omissions were made in the proxy statements and that there was a direct causal connection between the approved action or transaction and damage resulting to the plaintiff. See Stahl v. Gibraltar Fin. Corp., 967 F.2d 335 (9th Cir. 1992) (plaintiff has standing to bring direct action even where he has not relied an challenged misstatements). See also In re Tennecco Sec. Litig., 449 F. Supp. 528, 531 (S.D. Tex. 1978) ("In order to recover

damages under 14(a) the proxy violation must have caused the economic harm alleged.").

In order to decide which, if any, of the non-time-barred misrepresentations and omissions in the 1987 and 1988 Proxy Statements might serve as the basis of a claim under § 14(a), a determination must be made whether materiality and causation have been alleged as to them. This is a very difficult task because of the way in which plaintiffs have jumbled together numerous misrepresentations and omissions made over this long three year period. Nevertheless, the Court has tried to cut through this obscure pleading in order to make a determination as to each one of the non-time-barred misrepresentations and omissions that remains:

(1) The 1987 Proxy Statement failed to disclose that the FHLBB was demanding that GFC maintain the minimum regulatory capital required for Gibraltar Savings and that Gibraltar Savings not pay cash dividends to GFC in excess of 50% of Gibraltar Savings' annual income. Thus, it was not disclosed that GFC would have insufficient cash to consummate the acquisition of FSBF and that it would be forced to sell to Gibraltar savings $35 million of the preferred stock of its Gibraltar Savings of Washington subsidiary in order to close the FSBF transaction. Assuming that after the 1987 Proxy Statement was sent out, GFC did enter into a Capital Maintenance Agreement with the FHLBB which required it to structure the FSBF acquisition as it did, there is still no allegation as to how the acquisition of FSBF caused the plaintiffs' loss. one can only speculate as to how the acquisition of FSBF is tied to GFC's losses or to plaintiffs' losses. Nevertheless, resolving any and all doubts in favor of the plaintiff, the Court will permit this claim to go forward until it can be tested by a fully dispositive motion.

(2) The 1987 Proxy Statement allegedly failed to accurately report the total compensation of certain executives or the fact that certain executives received $12 million in bonuses. No facts are alleged from which an inference can be drawn that such payments were wrongful, or how and in what way these omissions caused plaintiffs' loss. Thus, a pleading of materiality and causation is lacking here also. However, here too the Court will await a fully dispositive motion on this claim.

(3) The 1987 Proxy Statement allegedly failed to disclose that GFC's officers and directors were both unqualified and incompetent. This allegation is wholly lacking in specificity since it fails to name any officer or director, or to describe how this omission caused the plaintiffs' loss. This claim is too vague to be permitted to proceed.

(4) Although the 1988 Proxy Statement is claimed to have been fraudulent, only two corporate acts are alleged to have been affected by these proxy materials. Those are the entering into the indemnity agreement and the acquisition of FSBF, yet both of these acts were voted upon and approved in 1987. Therefore, all claims based upon misrepresentations or omissions alleged with respect to the 1988 Proxy Statement fail for lack of the threshold requirement of materiality. Misrepresentations or omissions are material if "there is a substantial likelihood that a reasonable shareholder would consider (them] important in deciding how to vote."[59/] The Court cannot simply presume materiality, and because no facts have been alleged to establish it, this claim would ultimately fail on a dispositive motion. Therefore, it cannot proceed now.

[59/] TSC Ind., Inc., v. Northway, Inc., 426 U.S. 438, 449 (1975).

Based on the foregoing analysis, the § 14(a) claims arising out of the alleged misrepresentations and omissions in the 1987 Proxy Statement which are specifically identified in categories (1) and (2) above may proceed. The claims based on the 1988 Proxy Statement may not. All other claims under § 14(a) which are not barred by the statute of limitations are dismissed for failure to state a claim.[60/]

3. Substantial Connection To Solicitation Efforts

The only persons subject to liability for violations of § 14(a) are persons who solicit the proxy and persons who "permit the use of [their] names to solicit" the proxy. U.S.C. § 78n(a). In the Ninth Circuit, the element of scienter is required for a claim under § 14(a) when the defendant is not the corporate issuer of the proxy material. Zatkin v. Pr muth, 551 F. Supp. 39, 45 (S.D. Cal. 1982) (plaintiff must allege scienter against accountant for liability pursuant to § 14(a)).

The Ninth Circuit first articulated the standard for liability pursuant to § 14(a) in Yamamato v. Omiya, 564 F.2d 1319 (9th Cir. 1977) by stating:

> (I)n order to hold a person liable for proxy violations, one must show, at the very least, a substantial connection between the use of the person's name and the solicitation effort.

[60/] As to all § 14(a) claims which are dismissed, the aiding and abetting claims under § 14(a) are also dismissed. Furthermore, as to all claims for federal securities violations which are dismissed, the claims alleging controlling person liability are also dismissed.

Id. at 1323 (the appearance of defendants--the proposed buyer of building--name and address in the proxy statement did not reveal any control by defendant over the statement or his adoption of it). The "substantial connection" requirement is satisfied as against parties who did not actively solicit the proxy materials only when those parties permitted the use of their names and directly benefited by the shareholders' favorable vote. Mendell v. Greenberg, 612 F. Supp. 1543, 1552 (S.D.N.Y. 1985), aff'd in part, 927 F.2d 667 (2d Cir. 1990). Moreover, the mere participation in the drafting of the proxy statement is insufficient to constitute solicitation. Id. at 1552.

Plaintiffs have failed to allege a substantial connection between the use of Rifkind's, Gibson's, Ernst's, Post's, Boyle's and Glupker's names and any solicitation efforts. The allegation that these defendants participated in the preparation of the proxy statements or merely allowed their 1985 reports to be republished and included in the proxy statement is insufficient to constitute "solicitation" under § 14(a). Moreover, there is no allegation that Rifkind, Gibson or Ernst benefitted in any way from the vote of the GFC shareholders on the FSBF acquisition. As to Post, Boyle and Glupker, they were employed by Gibraltar Savings not GFC. The proxy statements were GFC materials. Further, the only allegations relating to Post's, Boyle's and Glupker's participation in any of the alleged fraud is that concerning the Galleria. The facts concerning the alleged fraud regarding the Galleria were disclosed by November 3, 1987, and thus-a proxy claim based upon this allegation is time-barred. The § 14(a) claims against these defendants are dismissed.[61/]

[61/] The aiding and abetting claim under section 14(a) is also dismissed with prejudice against these defendants as there are insufficient allegations of "substantial assistance" and "actual

III. RICO

18 U.S.C. § 1964 (c) provides a private right of action under RICO. The section states that:

> [a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

A violation of § 1962 is established by proof:

> (1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate or foreign commerce. Moss v. Morgan Stanley Inc.., 719 F.2d 5, 17 (2d Cir. 1983), cert. denied sub nom. Moss v. Newman, 465 U.S. 1025 (1984).

Here, plaintiffs allege that certain members of the management of GFC together with GFC's accountants formed an enterprise which engaged in a pattern of racketeering activity in violation of RICO. Defendants challenge the RICO allegations made against them as lacking one or more of the elements necessary to establish this claim.

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knowledge."

A. Predicate Acts

Racketeering activity as defined in § 1961(l) includes "fraud in the sale of securities" and acts indictable under the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343. Plaintiffs' claims for "fraud in the sale of securities" under § 10(b) have been dismissed against the moving defendants.[62/] Acts of proxy fraud under § 14(a) do not qualify as predicate acts under RICO. First Pacific Bancorp, Inc. v. Bro, 847 P.2d 542, 546 (9th Cir. 1988). Also, acts of fraud "in connection with the sale of securities" have been found not to qualify as predicate acts under RICO. See In Re Par Pharmaceutical, Inc. Sec. Litig., 733 F. Supp. 668, 684 (S.D.N.Y. 1990) ("only fraud that occurs as part of the actual securities transaction," not just in connection with the sale of a security, is a predicate act under RICO). Thus, there remains only the possibility of finding that the acts of mail or wire fraud alleged against plaintiffs furnish this necessary element of a RICO violation. However, acts of mail or wire fraud must be alleged with sufficient particularity so that the Court is satisfied that it knows-what they are and who committed them. Also, the Court should be able to infer from the allegations that each of the defendants participated in some way in the commission of

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[62/] Because plaintiffs fail to establish viable securities claims, they fail to establish predicate acts for RICO. See Nutis V. Penn Merchandising Corp., 610 F. Supp. 1573, 1583 (D.C. Pa. 1985), aff'd, 791 F.2d 919 (1986). While the Ninth Circuit has applied a four year statute of limitations to securities claims as predicate acts under RICO, see Stitt v. Williams, 919 F.2d 516, 525 (9th Cir. 1990), unless plaintiffs establish a valid securities claim to begin with, there is no predicate act to which to apply the time bar.

the predicate acts.[63/] certainly, Rule 9(b) requires that as to each defendant, there be something more than general allegations that the defendants were "all in on it." Looking carefully at the Second Amended Complaint, the Court is uncertain as to whether mail or wire fraud is even claimed. It is certain that neither mail fraud nor wire fraud has been adequately alleged.

B. Pattern of Racketeering Activity

The Court finds no sufficient allegation of racketeering activity and consequently can find no pattern of such activity. There must be predicate acts alleged and there must also be "a pattern of racketeering activity" in which the participation of each RICO defendant is alleged. 18 U.S.C. § 1961(l) defines this pattern as requiring "at least two acts of racketeering activity." The Supreme Court has explained that although two acts may be necessary, two may not be sufficient. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1984). Proof of a pattern requires continuity plus relationship with respect to the alleged acts of racketeering activity. Id.

In determining whether the acts of racketeering are sufficiently related, courts should look for "criminal conduct (that) embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 240 (1988) (quoting i 3575(e) of Organized Crime Control Act of 1970).

[63/] Blake v. pierdorff, 856 F.2d 1365, 1368-72 (9th 28 Cir. 1988).

To establish continuity "it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity." Id. at 240 (emphasis added). The Supreme Court has explained that, "[c]ontinuity' is both a closed- and open- ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition . . . A plaintiff alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long term criminal conduct." Id. at 241-42.

Application of this standard to the allegations in the Second Amended Complaint does not result in a finding of the required relationship or continuity between the various acts of the defendants, thus making it impossible for plaintiffs to sustain a RICO claim based on them. As an example, several claims relate to the distribution of false or misleading information in the second 1986 Annual Report. It is alleged that defendants Williamson, Janis, Thayer, Nussbaum, Mooney[64/], and Kang all engaged in fraudulent activities through the use of the mails in connection with the authorization, preparation, and/or dissemination of incorrect financial statements included in the 1986 Annual Report. All of this activity took place in and around April of 1987 and related solely to the distribution of this one report, leading to the conclusion that these activities were not conducted over a "substantial period of time," nor did they

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[64/] It is alleged that Mooney authorized the preparation of misleading financials for 1985, 1986 and 1987, The claims relating to the other years are treated below.

of continuity. Courts in the Ninth Circuit have consistently held that isolated activities which take place over a brief period of time, are not sufficient to allege a pattern under RICO. See Jarvis v. Regan, 833 F.2d 149, 153 (9th Cir. 1987) (no pattern 20 established in RICO claim where predicate acts related to single objective and presented no threat of continuing); Service Engla, Co. v. Southwest Marine, Inc., 719 F. Supp. 2500, 1508 (N.D. Cal. 1989) (activity extending over a few weeks or months with no threat of continuity does not constitute a pattern for purposes of RICO). It is not enough to allege that all the defendants were involved with GFC or that all of the acts occurred in connection with GFC's corporate affairs. If it were, all claims involving the corporate affairs of public companies would be RICO claims.

All of the allegations of this extraordinarily long Second Amended Complaint require examination defendant by defendant because "courts will generally decline to consider in the pattern analysis as to one defendant misconduct 11 adequately alleged only as to a codefendant." Arthur Mathews, et al., Civil RICO Litigation § 4.03[E] at 8-82 13 (1991). Looking at the allegations with this principle in 14 mind, there is neither continuity nor relationship, and thus no pattern.

C. Enterprise

A RICO claim requires that there be an enterprise through which the pattern of racketeering is conducted. Under 18 U.S.C. § 1961(4), an enterprise is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Thus, "a group of persons associated together for a common purpose of engaging in a course of conduct," the existence of

which "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit" may qualify as a RICO enterprise, United States v. Turkette, 452 U.S. 576, 583'(1980); United States v. Feldman, 853 F.2d 648, 657 (9th 3 Cir. 1988), cert, denied, 489 U.S.. 1030 (1989). However, "[T]o avoid dismissal for failure to state a claim, a [RICO] plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise." Comwest Inc. v. American Operator Services, Inc., 765 F. Supp. 1467, 1475 (quoting Elliott v. Foufas, 867 F.2d 877, 881 (Sth Cir. 1989)). Here, as stated, it is alleged that the RICO enterprise is alleged to be an association in fact consisting of defendants Young, Williamson, Thayer, Janis, Nussbaum, Mooney, Flournoy, Spitz, Sprayregen, Leventhal, Kang, and Peat ("RICO defendants").

In this case, the plaintiffs' RICO claim is defective primarily because of the conclusary nature of the allegations of the enterprise. Plaintiffs allege the conclusion that the defendants "constituted an association in fact and an enterprise which operated separately and distinctly from Gibraltar," but fail to allege any facts which would permit an inference that this group actually did operate separately and distinctly from GFC or Gibraltar Savings. While plaintiffs allege that the RICO defendants "devised a plan", "organized and carried out their plan", and kept their efforts in furtherance of the plan secret, the complaint noticeably lacks any allegation of organized activity other than that which would normally be found in a large public company. Instead, claim after claim is based on acts by separate individuals and entities carrying out their usual functions as officers, directors or employees of GFC or Gibraltar Savings. Plaintiffs sees to be asking the Court to accept the conclusion that if acts are alleged that could constitute violations of the securities laws, then the persons who

committed then are necessarily part of an enterprise engaged in racketeering activity. The Court cannot make such a leap.

The court in United States v. Riccobene, 709 F.2d 214 (3d cir.), cert. denied sub. nom Ciancaglini v. United States, 464 U.S. 849 (1983), analyzed the concept of a RICO enterprise and found that it must have three components. First, the ",ongoing organization' component relates to the superstructure or framework of the group [and requires that] some sort of structure exists within the group for the making of decisions, whether it be hierarchical or consensual." Id. at 222. Second, the "'various associates [must] function as a continuing unit' (which requires] that each person perform a role in the group consistent with the organizational structure . . . and which furthers the activities of the organization." Id. at 223. Third, the enterprise must be "'an entity separate and apart from the pattern of activity in which it engages [requiring] an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses." Id. at 223-24.

The pleading requirements for a RICO claim are imposed by the courts because "RICO was not designed to serve as a recidivist statute, imposing heavier sentences for crimes which are already punishable under other statutes. The Act was not intended to be a catchall reaching all concerted action of two or more criminals involving two or more of the designated crimes." United States v. Bledsoe, 674 F.2d 647, 659 (8th Cir.), cert. denied sub. nom Phillips v. United States, 459 U.S. 1040 (1982). The same may be said of two or more defendants involved in two or more securities violations. RICO was not designed to grant all securities fraud claimants an automatic entitlement to treble damage awards.

The Second Amended Complaint not only fails to allege facts which would permit an inference that there was an enterprise with a common purpose, but also wholly fails to allege facts that would permit the additional inference that the enterprise was distinct from the claimed pattern of racketeering. "The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages," Turkette, 452 U.S. at 583. In analyzing this feature of RICO, the circuit courts have reached differing conclusions on the issue of whether "a RICO enterprise must have an ascertainable structure distinct from that inherent in the pattern of racketeering activity," Feldman, 853 F.2d at 659-60.

The Eighth and Third Circuits[65/] require a structured, ongoing organizational unit while the Second and Eleventh Circuits generally find that repeated criminal activity by a group with no other organizational structure may be sufficient. Mathews at § 5.04 at 5-22 (1991). While the Ninth Circuit has thus far declined to decide the question, Feldman, 853 F.2d at 659-60, district courts in the Ninth Circuit have generally taken the view that a separate ascertainable structure must be alleged. It is not enough to define the enterprise by the racketeering activities it engages in; the enterprise must be shown to exist as a unit apart from the sum of its activities. Rhoades v. Powell, 644 F.Supp. 645, 673 n.21 (E.D. Cal. 1986), aff'd sub. nom Rhoades v. Merrill Lynch, Pierce, Fenner & Smith, 961 F.2d 217 (9th Cir. 1992); In Re Nat'l Mortgage, Equity Corp. Mortgage, Pool, 636 F. Supp. 1138, 1160 (C.D. 18 Cal 1986); Medallion TV Enter, Inc. v. SelecTV of California, Inc., 627 F. Supp 1290, 1294 (C.D. Cal. 1986), aff'd 833 F.2d 1360 (9th Cir. 1987), cert. denied, 492 U.S. 21 917 (1989);

65/ The Fourth, Fifth and Seventh circuits generally follow the structured approach as well.

Allington v. Carpenter, 619 F. Supp. 474, 478 22 (C.D. Cal. 1985).

District courts around the country have considered the two views and generally agreed with the Eighth Circuit's approach because that of the Second Circuit "appears to render the 'enterprise, requirement superfluous" and "ignores the organizational nexus at the heart of the RICO scheme." Allington, 619 F.- Supp. at 479; In re National Mortgage, 636 F. Supp. at 1160. This Court agrees with that analysis,[66/] particularly under the facts of this case, and will follow the Eighth Circuit's approach requiring that a separate structure exist apart from the pattern of racketeering activity.

"[U]nder RICO, an enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts." Bledsoe, 674 F.2d at 664. Rather, the "distinct structure (of the enterprise separate from that inherent in the conduct of a pattern of racketeering activity) might be demonstrated by proof that a group engaged in a diverse pattern of predicate acts or that it has an organizational 17 pattern or system of authority beyond what was necessary to perpetrate the predicate [acts]." Id. at 665.

Plaintiffs claim that the RICO defendants "were all part of Young's inner circle at Gibraltar organized into a group . . . [which] operated separately and distinctly from Gibraltar and the legitimate business and management of Gibraltar.[67/] "The purpose . . . of the enterprise was to

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[66/] In a civil case alleging fraud in the sale of securities, plaintiff should be required to prove each element of RICO in order to qualify for treble damages.

[67/] Plaintiffs' RICO Case Statement at 97 (May 13, 1991).

infiltrate and subvert the legitimate management of Gibraltar and to perpetuate the continued dominance and control of the members of the enterprise over Gibraltar by covering up and concealing substantial operating and other losses by Gibraltar. . . . " Id.

Even a cursory analysis of the enterprise as alleged demonstrates that there is no structure which exists separate and apart from the pattern of racketeering activity. The very purpose of the enterprise was to promote the alleged fraudulent acts. The only way the enterprise can be identified is by looking at the definition of the racketeering activities each defendant allegedly participated in. Moreover, plaintiffs allege no overarching structure. Other than the allegation that Young headed the enterprise, no identification of the officers, directors or employees of the enterprise is even attempted. Thus, plaintiff has not alleged an association-in-fact which exists separate and apart from the pattern of racketeering activity. The conclusion may be there, but the facts are not. After all this time and all the prior litigation, plaintiffs still are unable to allege a factual basis for their RICO claims.

As a final point, in plaintiffs' RICO Statement, they are apparently attempting to assert a claim under U.S.C. § 1962(b) as well as § 1962(c) by stating that, "The enterprise (members of Young's inner circle) engaged in racketeering activities as part of their efforts to maintain dominance and control over Gibraltar. As a result of such control, the members of the enterprise acquired interests in Gibraltar in the form of GFC stock options and otherwise." Section 1962(b) provides that, "It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire . . . any interest in or control of any enterprise which is engaged in . . . interstate . . . commerce." Here, plaintiffs do not allege the acquisition of an interest in the enterprise, defined

is that plaintiffs are confused about the factual theory of their RICO claim. The Court is also confused.

D. Inquiry

Civil RICO plaintiffs must allege and prove an injury to "business or property." Oscar v. Univer. Students Co-op. Ass'n, 965 F.2d 783, 785 (9th Cir. 1992) ("injury requires proof of concrete financial loss"); Kaiser v. Fischbach & Moore, 793 F.2d 1100, 1104 (9th Cir.), cert. denied, 479 U.S. 949 (1986) ("Actual injury attributable to something the . . . laws were designed to prevent . . . is . . . the sine qua non of recovery (on theory of RICO)"). The plaintiffs here have alleged injury to the value of their investment resulting in the main from securities fraud. However, examining the chronology of events with respect to each of the plaintiffs, it becomes clear that as to certain of the RICO allegations, plaintiffs have alleged activity by the defendants that could not possibly have caused them any injury, and which, therefore, cannot be the basis for recovery by them in a civil RICO action. Here again, attempting to relate the defendants' "racketeering activity" over a three year period to the plaintiffs' buys and sells makes it almost impossible to analyze the injury element of their RICO claims. The pleading is obscure in this regard, and probably deliberately so. The RICO statement filed by plaintiffs makes it no clearer.

E. Summary of RICO

The RICO claims against the moving defendants must fail for many reasons. The most significant flaw in the Second Amended Complaint, of course, is the lack of a 13 sufficient allegation of an enterprise, certainly not a rise separate from any pattern of racketeering activity. Moreover, many of the claims that arguably allege viable

Moreover, many of the claims that arguably allege viable predicate acts fail to state an injury, while others lack the necessary specificity required of fraud claims. Some are based on securities violations which this Court has already found insufficient to state a claim, while others are simply based on acts which cannot qualify as predicate acts of racketeering activity within the definition of the RICO statute. Finally, those claims that survive these initial waves of scrutiny do not meet the standards set for establishing a pattern of racketeering activity, leaving plaintiffs no cognizable claim under RICO.

IV. STATE LAW CLAIMS

Plaintiffs' sixth, eighth, ninth, tenth, eleventh, twelfth, and thirteenth causes of action contain allegations under state law against moving defendants Post, Boyle, Harrison, Glupker, Nussbaum, Rifkind, Ernst, Peat, and Gibson. The same facts alleged in support of the federal claims are also alleged in support of these state law claims.

A. Breach of Fiduciary Duty (Sixth Cause of Action)

1. Nussbaum

As to this claim, Nussbaum correctly argues that plaintiffs, state law claim for breach of fiduciary duty is barred by the statute of limitations, but incorrectly relies on a two year statute. The statute of limitations to be applied here is found in Cal. Code of Civ. 17 Pro. § 338(d), which establishes a three year statute of limitations for "[a]n action for relief on the ground of fraud or mistake.[68/] This

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[68]/ See Meadows v. Bicrodyne CoM,, 785 F. 2d 670, 671 (9th Cir. 1986) (three year statue of limitation for fraud or mistake applied to claims for fraud and breach of fiduciary duty.) The Court notes

statute begins to run "when the plaintiff discovered or could have discovered the fraud with the exercise of reasonable diligence . . . [and that] is usually question for the trier of fact." Nevada Power, 955 F.2d 1304 at 1308 (quoting General Bedding Corp. v. Echeyarria, 947 F.2d 1395,.1397 n.2 (9th Cir. 1991)). Nevertheless, "[r]easonable diligence is tested by an objective standard, (citation omitted] and when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct, 8 the issue may be decided on summary judgment. It Davis v. Birr, Wilson & Co., 839 F.2d 1369, 1370 (quoting Kramas v. Security Gas & Oil, Inc., 672 F.2d 766, 770 (9th Cir.), cert, denied, 459 U.S. 1035 (1982); accord Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873, 877 (9th Cir.), cert, denied, 469 U.S. 932 (1984). The claims against Nussbaum are time-barred because all of the material claims against Nussbaum involve alleged misrepresentations relating to losses from the Galleria. Because those losses were sufficiently disclosed by November 3, 1987 at the latest, the statutory period began to run on that date, and any actions based on those misrepresentations or omissions are time-barred.

2. Post, Boyle, Harrison and Glupker

The allegations of breach of fiduciary duty against Post, Boyle, Harrison and Glupker are also time-barred, and fail to state a claim. With respect to those allegations that center on misrepresentations or omissions on

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and rejects the application of a four year statue of limitation in Davis Cox v. Summa Corp., 751 F.2d 1507, 1520 (9th Cir. 1985). Davis is distinguishable for its emphasis on the action at issue as a breach of a director's duties for waste and mismanagement. Here the plaintiffs are alleging breach of duties based on fraudulent misrepresentations and omissions.

subjects covered by the October/November 1987 disclosures, the claims have been brought too late, as discussed above. The remainder of the allegations state no claim upon which relief may be granted, as plaintiffs can demonstrate no injury. As discussed in greater detail below in the section on the state law fraud claims, these non-time-barred claims relate to statements and press releases made over a period when no representative plaintiff purchased GFC securities. If the representative plaintiffs bought no GFC securities in reliance on any statements by these defendants, they cannot allege any injury from any breach of fiduciary duty on them.[69/]

3. Ernst/Peat

As discussed below, in relation to the cause of action for constructive fraud, the plaintiffs have failed to allege a fiduciary relationship between themselves and defendants Ernst or Peat. Without such a relationship, there can be no breach of duty arising out of such a relationship.

4. Gibson

By order dated June 18, 1991 and entered July 15, 1991, this Court dismissed with prejudice the claim of breach of fiduciary duty against Gibson. Plaintiffs were given no right to replead this cause of action in the Second Amended

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[69/] Because the plaintiffs' claim is essentially that defendants breached their fiduciary duty by way of fraudulent misrepresentations and omissions, if a constructive fraud cannot be alleged, there is likewise no claim for breach of duty. See Byrum v. Brand, 268 Cal. Rptr. 609, 616-18 (analysis of breach of fiduciary duty intertwined with analysis of constructive fraud). Therefore, the plaintiffs' failure to state claims against the defendants for constructive fraud also impacts negatively on their ability to state a claim in this cause of action.

Complaint. It is dismissed with prejudice pursuant to the prior order of this Court. Although an award of sanctions would be appropriate based on this deliberate violation of the Court's prior order, the Court will resolve all doubts in favor of plaintiff and decline to make such an award.

B. Actual and Constructive Fraud (Eighth and Ninth Causes of Action)

The necessary elements of a claim for actual fraud under Cal. Civ. Code § 1572 are "false representation as to a material fact, knowledge of its falsity, intent to defraud, Justifiable reliance and resulting damage." Wilhelm v. Pray, Price, Williams & Russell, 231 Cal. Rptr. 355, 357 (Cal. App. 2 Dist. 1986) (emphasis in the original). Constructive fraud "allows conduct insufficient to constitute actual fraud to be treated as such where the parties stand in a fiduciary relationship. The difference between actual fraud and constructive fraud is primarily in the type of conduct which may be treated as fraudulent, such as a failure to disclose material facts within the knowledge of the fiduciary." Matter of Estate of Gump, 2 Cal. Rptr. 2d 269, 281 (Cal. App. 1 Dist. 1991) (emphasis in the original).[70/]

By matching up the various allegations as to what the defendants did with the three periods of time relevant to the representative plaintiffs, claims, the Eighth and Ninth Causes of Action for actual and constructive fraud are revealed to be insufficient, either because they fail to state the elements of

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[70/] Cal. Civ. Code § 1573 states: "Constructive fraud consists: 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or, 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud."

either type of fraud or because they 8 have been brought outside of the three year period of the statute of limitations applicable to these claims.[71]

1. Post, Boyle, Harrison and Glupker

Claims based on the allegations that the defendants knew of real estate losses before October 1987, and that they prepared false and misleading documents for shareholders and the SEC before October 1987 in order to cover up the losses all fail because they are barred by the statute of limitations. As has been discussed in the section on federal securities fraud, plaintiffs clearly should have discovered the fraud by the exercise of reasonable diligence by November 3, 1987 but did not bring the instant action until November 16, 1990, more than three years later. That the October 1987 report misstated the period over which the losses occurred can neither excuse the plaintiffs from the running of the statute of limitations, nor can it furnish an independent basis for either actual or constructive fraud claims.[72]

The allegations that the 1987 Proxy Statement contained a misrepresentation that the Board was unaware of any threatened claims against it has also been considered, and rejected, in the federal securities fraud context. In that analysis, the Court determined that even if those responsible for the Proxy Statement might have been aware of threatened claims, plaintiffs have alleged no loss resulting from that misrepresentation. That flaw is no less fatal here, where to allege state law fraud the plaintiffs must allege an injury from the fraud. None is alleged here, and the claim must fail.

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[71] See Cal. Civ. Proc. Code § 338(d).

[72] supra, note 46.

The allegations of fraud in the preparation of documents after the October/November 1987 announcement of losses also must fail. These documents include the 1987 Annual Report and 10-K, the 1988 Proxy Statement and the January 1988 press release. while all of these alleged acts fall within the period in which claims would not be time-barred, they also fall within the period in which no representative plaintiff bought GFC securities--a period within which no representative plaintiff can show justifiable reliance on any misrepresentations. As a final point,for any period in which a representative plaintiff did buy securities, and therefore can allege reliance on some alleged misrepresentation or omission by defendants, they must allege actual reliance. The fraud on the market theory created with respect to federal securities claims is not viable with respect to the state law fraud claims. See In Re 3Com Sec. Litig., 761 F.Supp. 1411, 1419 (N.D. Cal. 1990) ("Plaintiffs . . . may not rely on the 'fraud on the market' theory for common law fraud claims," and must "allege individual reliance."). This means that as to the state law fraud claims, it is highly unlikely that the required commonality for a class action could ever be shown.

2. Nussbaum

The allegations made specifically against Nussbaum all relate to the period before the October/November 1987 disclosures. Therefore, the actual and constructive fraud claims against him are time-barred.

3. Rifkind

The majority of the allegations upon which the fraud claims against Rifkind are based occurred before the October/November 1987 disclosures and are therefore time-barred. Plaintiffs also allege a misrepresentation in the October 30, 1987 press release relating to the actual

period in which Gibraltar's losses were sustained. However, the Court has already determined these statements to be immaterial.[73/] The other major claim against Rifkind relates to statements made in 1988 that GFC was in "sound financial condition." These statements were made during a period in which no representative plaintiff bought GFC securities. Therefore, there is no representative plaintiff who can claim justifiable reliance.

4. Ernst

The fraud allegations against these defendants fail to state a claim. As defendants properly argue in their motion, it is not clear that Ernst made any affirmative representations in performing its audit of GFC. But, even more clearly, plaintiffs' allegations do not include sufficient averments of Ernst's knowledge that the audits were false or that there was any intent to defraud on Ernst's part. The very language that plaintiffs use to describe Ernst's involvement in GFC's financials--stating that Ernst was reckless and/ or negligent and that Ernst only came to know of the inaccuracies after their reports were issued belies any belief in intentional misrepresentation.

The claim of constructive fraud is also faulty for the same reasons, but in addition because the required fiduciary relationship between Ernst and the plaintiffs is absent. See Byrum, 268 Cal. Rptr. at 617 (1990) (fiduciary relationship essential to claim for constructive fraud). Plaintiffs only glancingly allege a fiduciary relationship between themselves and Ernst, while Ernst points out that the law does not

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[73/] See supra, note 46.

ordinarily recognize accountants as fiduciaries.[74/] Without a sufficient allegation of such a relationship, the claim for constructive fraud cannot be sustained.

Finally, the allegations against Ernst are time-barred. They involve inaccuracies in financial statements made before the October/November 1987 disclosures. The inaccuracies are relevant only to the extent that they related to understated losses, losses which were disclosed by November 3, 1987, more than three years before plaintiffs filed their complaint.

5. Peat

The analysis of these claims against Peat is much the same as that relating to Ernst. The claims are flawed in the same ways, namely failure to allege knowledge on the part of Peat, failure to allege affirmative representations by Peat, and failure to allege a fiduciary duty. There is also the same limitations problem, heretofore discussed, as to the allegations of fraudulent acts prior to November 3, 1987. Although there is no such problem as to the claims against Peat based on inaccuracies and failures to disclose in relation to financial reports issued in 1988, these allegations fail to state a fraud claim on other grounds. These allegations relate to a period when because no representative plaintiff bought GFC securities, no representative plaintiff can properly allege justifiable reliance.

6. Gibson

By order dated June 18, 1991 and entered July 15, 1991, this Court dismissed with prejudice the claim against Gibson for constructive fraud. Nevertheless, plaintiff

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[74/] See, e.g., Painters of Phil, plot, Council v. P Waterhouse, 879 F.2d 1146, 1149 (3d Cir. 1989).

did not hesitate to replead this claim. This claim is again dismissed with prejudice pursuant to the prior order of this Court. Further, analysis of the specific allegations made in support of the actual fraud claims against Gibson leads to the inevitable conclusion that all of them must be dismissed for failure to state a claim. Plaintiffs first allege that Gibson failed to disclose that litigation had been threatened against GFC management. As discussed, the claim is made that Gibson prepared a draft of the indemnity agreement which was included in the 1987 Proxy Statement which stated that GFC was not aware of any pending or threatened claims against management. This statement was allegedly false since Gibson had received two letters[75/] which indicated that a partner in GCB was threatening litigation. Further, Gibson is alleged to have known that one of GFC Is shareholders had initiated litigation against GFC. The two lawsuits which arose from these allegations were the Stahl suit against GFC and the partnership litigation brought against GFC. The Second Amended Complaint fails to-allege the materiality of this misrepresentation or the way in which it caused the representative plaintiffs any injury since it never alleges that litigation against Gibraltar management actually resulted.[76/]

Plaintiffs next allege fraud based on misrepresentations regarding the method by which real estate investments were valued. Plaintiffs should have discovered this alleged misrepresentation by November 3, 1987, more than three years before November 16, 1990. This allegation of fraud is time-barred.

[75/] The Dorman & Wheeler and the Adams letters.

[76/] In fact no litigation against management did result from these allegations.

The third allegation of fraud against Gibson is that they misrepresented the 1987 Proxy Statement as complete and accurate. Several categories of facts are alleged to have been omitted from the statement, contrary to Gibson's assertions of completeness. The first was the existence of two versions of the 1986 financials containing conflicting accounting with respect to the Galleria. As discussed, fraud based on this allegation is time-barred.[77/]

The second set of facts alleged to have been omitted involve the acquisition of FSBF. It is claimed that the 1987 Proxy Statement was misleading because it failed to disclose the terms of a Capital Maintenance Agreement under the terms of which GFC agreed to maintain the minimum regulatory capital required-for Gibraltar and also agreed not to cause Gibraltar to pay cash dividends to GFC in excess of 50% of its income for the year. The Proxy Statement also failed to disclose that in order to consummate the acquisition, GFC would be forced to sell Gibraltar Savings $35 million of the preferred stock of its Gibraltar Savings of Washington subsidiary. Aside from all the other difficulties with this claim, there is no allegation of how the acquisition of FSBF caused any injury to plaintiffs. No facts are alleged which tie the acquisition of FSBF to Gibraltar's losses or to the plaintiffs I losses. Both causation and injury are wholly lacking as to this claim.

The last of the facts that Gibson allegedly failed to report was the total compensation of certain executives and the fact that certain executives received $12 million in bonuses. There is no allegation that these payments were fraudulent, for an improper purpose or without authority. Materiality and

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[77/] See Cal. Code. Civ. Proc. § 338 (d) .

causation with respect to these allegations is completely lacking.

The fourth allegation of fraud is that Gibson represented that the special Committee had found no evidence of wrongdoing by the management of GFC. In this regard, the complaint never alleges that this was in fact a false statement or that the Committee did find evidence of wrongdoing. As with countless other allegations, the Court is left to wonder where the other required elements of a fraud claim may be found.

The remaining allegations against Gibson are either in the form of omissions--Gibson was aware that Gibraltar stated it was in sound condition although Gibson was aware that the FHLBB had expressed concern about the soundness of Gibraltar or are overly broad and devoid of any specificity regarding Gibson's fraudulent behavior--"Gibson Dunn prepared or participated and assisted in the preparation of (multiple financial reports, press releases and public statements]."[78/] Gibson cannot be held liable for failure to disclose the FHLBB's concerns, since, as the attorney for GFC, Gibson had no fiduciary duty toward the representative plaintiffs here. See e.g. Skarbrevik v. Cohen, England Whitfield, 282 Cal. Rptr. 627 (1991) (counsel for corporation has no fiduciary duty toward individual shareholders). Moreover, general allegations of preparation and assistance by an attorney are inadequate. See e.g. Hokama v. E.F. Hutton & Co., Inc., 566 F. Supp. 636, 645 (C.D. Cal. 1983).

C. Failure to Plead with Particularity

Fed. R. Civ. Proc. 9(b) provides that in "all averments of fraud or mistake, the circumstances constituting

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[78/] See, e.g. Complaint at 79-81

fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." See In Re Worlds of Wonder-Sec. Lit., 694 P. Supp. 1427, 1432 (N.D. Cal. 1988). The rule requires the plaintiff to identify the circumstances constituting fraud so that defendant can prepare an adequate answer by stating the "time, date and specific content or nature of the fraudulent representations or omissions." Id. Moreover, this requirement applies "even when the fraud relates to matters particularly within the knowledge of the opposing party." However, "plaintiffs are entitled to plead the defendants' scienter in conclusory fashion," Hokama, 566 F. Supp. at 645. The Ninth Circuit has explained that "[a] pleading is sufficient under rule 9(b) if it identifies the *15* circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations.... [and] [w]hile statements of the time, place and nature of the alleged fraudulent activities are sufficient, mere conclusory allegations of fraud are insufficient." Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1439 (9th Cir. 1987).

The court in Bruns v. Ledbetter, 583 F. Supp. 1050 (S.D. Cal. 1984) stated that a complaint, to satisfy Rule 9(b) "must set forth:

> (1) the nature of each individual defendant's participation in the fraud, including facts constituting scienter and an explanation of the defendant's duty toward the plaintiff;
>
> (2) whether the defendant is being sued as a primary defendant or as an aider and abettor; and
>
> (3) as to allegations on information and belief, a statement of the source of the information and

With respect to "false or misleading information in prospectuses, registration statements, annual reports, press releases, or other 'group published information,' it is 16 reasonable to presume that these are collective actions of the officers. Under such circumstances, a plaintiff fulfills the particularity requirement of Rule 9(b) by pleading the misrepresentations with particularity and where possible the roles of the individual defendants in the misrepresentations." Blake v. Dierdorff, 856 F.2d 1365, 1369 (9th Cir. 1988) (emphasis added). Nevertheless, this observation should not apply to fraud claims brought against attorneys and accountants five years and many lawsuits after the fact. A conclusory pleading under these circumstances should not be permitted.

To summarize, because all of the specific allegations on which the claims are based fail to plead fraud with particularity, because some are time-barred, and because others fail to allege causation or even injury, the Eighth and Ninth causes of action are dismissed as against all moving defendants.

D. Negligence and Negligent Misrepresentation (Tenth and Eleventh Causes of Action)

The elements of a state law claim for negligent misrepresentation are similar enough to claims for actual and constructive fraud that the analysis above need not be repeated.[79] The primary difference between the fraud and

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[79] "The elements of a cause of action for negligent misrepresentation are:

1. The defendant must have made a representation as to a past or existing material fact;

2. The representation must have been untrue;

3. Regardless of his actual belief the defendant must have made the representation without any reasonable ground for believing it to be true;

The elements of a state law claim for negligent misrepresentation are similar enough to claims for actual and constructive fraud that the analysis above need not be repeated.[79/] The primary difference between the fraud and negligent misrepresentation claims is that in order to state a negligent misrepresentation claim, the plaintiff need not allege that the defendant knew the falsity of the misrepresentation. It is enough that the defendant made it without reasonable belief. Christiansen, 231 Cal. Rptr. at 75. This difference is not sufficient to cause the Court to reach a conclusion with respect to this claim that is any different than that reached-with respect to the fraud claims.

More importantly, the outcome with respect to this claim is dictated by the Application of the two year statute of limitations respecting negligent misrepresentation claims. See

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[79]"The elements of a cause of action for negligent misrepresentation are:

1. The defendant must have made a representation as to a past or existing material fact;
2. The representation must have been untrue;
3. Regardless of his actual belief the defendant must have made the representation without any reasonable ground for believing it to be true;
4. The representation must have been made with the intent to induce plaintiff to rely upon it;
5. The plaintiff must have been unaware of the falsity of the representation; he must have acted in reliance upon the truth of the representation and he must have been justified in relying upon the representation.
6. And, finally, as a result of his reliance upon the truth of the representation, the plaintiff must have sustained damage."

Christiansen v. Roddy, 231 Cal. Rptr. 72,75 (Cal. App. 5 Dist. 1986) (citations omitted).

e.g., Continental Motion Pictures v. Allstat Film Co., 590 F. Supp. 67, 72 (C.D. Cal. 1984); David K. Lindemuth Co. v. Shannon Fin. Corp., 660 F. Supp. 261, 264 (N.D. Cal. 1987). But see Donoghue v. Orange County, 848 F.2d 926, 930 (one year statute of limitations applied to negligent misrepresentation action). Because all of the alleged misrepresentations occurred more than two years before the action was filed, all claims for negligent misrepresentation are time-barred.

Plaintiffs' Tenth Cause of Action for Negligence pleads no more than plaintiffs' Eleventh Cause of Action for Negligent Misrepresentation. The Supreme Court has stated:

> To say . . . that a claim arises out of 'negligence' rather than 'misrepresentation' when the loss suffered by the injured party is caused by a breach of . . . the duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely in the conduct of his economic affairs, is only to state the traditional and commonly understood definition of the tort of 'negligent misrepresentation."

United States v. Neustadt, 366 U.S. 696, 706 (1961) (finding that a claim was one arising out of misrepresentation and thus was not actionable against the government under the Tort Claims Act). The negligence claim here alleges:

> As a result of their actions and conduct as alleged herein, defendants . . . made and/or caused to be made or were negligent in failing to make or causing to be made or corrected certain statements . . . which defendants knew,

> or should have known after reasonable inquiry . . . were not accurate.

Complaint at 142-44.

Clearly, the allegations of negligence arise out of misrepresentation. Moreover, the negligent misrepresentation claim, asserted as the eleventh cause of action, is virtually identical and this claim adds nothing to it. Thus, this claim is deficient on the same grounds as the claim, for negligent misrepresentation.

E. False and Misleading Advertising (Twelfth Cause of Action)

This claim against Post, Boyle, Harrison, Glupker and Nussbaum under Cal. Bus. & Pro. Code § 17500 et seg. fails to state a claim. In Chern v. Bank of America, 127 Cal. Rptr. 110, 115 (1976), the court held that the statute in question does "not authorize recovery of damages by private individuals. Private relief is limited to the filing of actions for an injunction." While recently a California Court of Appeal has noted ambiguity in the case law[80], the Ninth Circuit has agreed with Chern, holding that the statute "authorizes no compensatory damages for *3* private parties. "E.W. French & Sons, Inc. v. General Portland Inc., 885 F.2d 1392, 1402 (9th Cir. 1989). Xerox Corp. v. Apple Computer, Inc., 734 F. Supp.

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[80] See Bank of the West v. Superior Court, 277 Cal.Rptr. 219, 228 (Cal. App. 1 Dist. 1991) rev'd on other grounds, _ Cal. Rptr. 2d _,61 U.S.L.W. 2102 (1992) (noting ambiguity in 1983 Cal. Supr. Ct. decision which declined to decide whether "a plaintiff other than a business competitor can recover damages on a cause of action based on the unfair competition or false advertising law." (quoting Committee on Children's Television, Inc. v. General Foods Corp., 197 Cal. Rptr. 783, 794 (1983)).

1542, 1550 (N.D. Cal. 1990) (damages not available to private plaintiffs). This claim is insufficient as a matter of law

F. State Securities Law Violations (Thirteenth Cause of Action)

This claim against Post, Boyle, Harrison, Glupker and Nussbaum is, for all practical purposes, incomprehensible. Certainly the least that can be expected of a pleading is that it state the particular statute under which defendants are said to be liable. This claim refers to virtually all of the California state securities laws, without specifying those for which defendants are actually alleged to be liable. If the aim of establishing pleading requirements is to ensure that each defendant be able to prepare an adequate answer, this claim must fail. Worlds of Wonder, 694 F. Supp. at 1432.

Even if the claim were viewed as intending to charge defendants with a violation of Cal. Corp. Code § 25401,[81] it fails to state a claim against Post, Boyle, Harrison, Glupker and Nussbaum. As explained above, the claims based on misrepresentations alleged to have been made prior to November 3, 1987 are time-barred.[82] The misrepresentation

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[81] This section reads as follows:

It is unlawful for any person to offer or sell a security in this state or buy or offer to buy a security in this state by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

[82] Cal. Corp. Code § 25506 requires that a civil action for damages under § 25401 must be brought "before the expiration of four years after the act or transaction constituting the violation or the

relating to the timing of the real estate losses are immaterial[83], and the remaining misrepresentations were not 8 made during a period when any representative plaintiffs bought GFC securities. Plaintiffs are no more successful on their state securities claims against Post, Boyle, Harrison, Glupker and Nussbaum than they were on their federal claims.

V. CONCLUSION

In assessing plaintiffs' argument that they should be given another chance to amend because they have not had a sufficient opportunity to discover what the facts are, the Court must give some weight to the past history of all the litigation involving "the facts". It is certainly clear that plaintiffs' counsel has pleaded the GFC facts for different plaintiffs a number of times in a variety of ways, but it is clearer still that the facts are always the same. The ingredients do not vary. They are just cooked up differently. The Court has been somewhat slow to recognize this because of the increasingly lengthy and disorganized method of pleading employed here. That method of pleading now appears to have been employed deliberately, with an intent to impede any clear analysis of the chronology of events involved, or the claims being alleged based on these events. The plaintiffs have scattered allegations randomly throughout the 154 page complaint in what now appears to be a conscious effort to obscure any recognition by

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expiration of one year after the discovery by the plaintiff of the facts constituting the violation, whichever shall first expire." (Emphasis added.) Therefore, with respect to those misrepresentations made before the November 3 1987 disclosures, suit would have had to have been brought by November 3, 1988

[83] See Toombs v. Leone 777 F.2d 465, 470 (9th Cir. 1985) (under California securities laws, plaintiff must prove materiality of misrepresentations and omissions).

the court that their claims, once isolated and analyzed, are either 18 time-barred or substantially without -merit.

In response to the motions to dismiss attacking the Second Amended Complaint, plaintiffs' counsel not only asked leave to amend, but also asked leave for other representative plaintiffs to intervene to save this case as a class action. The motion to intervene was in effect plaintiffs' counsels principal opposition to the motions to dismiss. Taking first then, the question of the propriety of intervention, it is an established principle that a "third party cannot intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure in a class action suit to save a claim as to which the original plaintiffs never had a claim 'for the intervenors cannot possibly have a claim or defense in common with a plaintiff who never had a claim'." Turner v. First Wisconsin Mortgage Trust, 454 F. Supp. 899, 913 (E.D. Wisc. 1978) (quoting Washington v. Wymaii, 54 F.R.D. 266, 272 (S.D.N.Y. 1971). Thus, the proposed intervenors cannot be permitted to save this litigation as a class action as to defendants against whom there were never any viable claims. These plaintiffs have no such federal claims against the defendants who are now being dismissed from all of the claims in the Second Amended Complaint. Even if they had viable federal claims, looking at their trading history, these plaintiffs were unlikely to be qualified as representatives of a class as to any claims against the dismissed defendants. Nevertheless, it may be that a very narrow class could be defined with respect to the federal claims the Court has not dismissed against the remaining defendants. The Court does not foreclose that possibility until all parties have had an opportunity to be heard. The Court is convinced, however, that the requisite finding of commonality could never be made with respect to any state law claim alleged in the Second Amended Complaint.

As to the propriety of amendment, it cannot be disputed that plaintiffs' counsel has been litigating these same issues for a long time, and he knows a lot about the facts. That of course does not in any way foreclose his clients from proceeding with their case because their counsel's knowledge is obviously not necessarily imputed to them. It does however reflect on the credibility of counsels protestations that he cannot plead these plaintiffs' claims more coherently than he has because he has had no discovery. It also reflects on the credibility of his earlier assertions that these two plaintiffs are suitable class action representatives. In light of his pleadings in prior cases it is somewhat disingenuous for plaintiffs' counsel to tell the Court that he did not know the facts until immediately prior to November 16, 1990. If the plaintiff in Weinberger could plead the facts on November 17, 1987, based on the earlier October/ November 1987 disclosures, why couldn't these plaintiffs do so in the three year period that followed those disclosures? An examination of the 16 chronology of events involved here invites conjecture as to why these plaintiffs waited so long.

As discussed, plaintiffs have stated a narrowly circumscribed proxy fraud claim based on the 1987 proxy material against some of the moving defendants. There are also a number of other defendants still remaining in the case. Therefore, although the Court is doubtful that these plaintiffs will ever be found qualified to represent a class with respect to the claims against the remaining defendants, that decision can be made at a later time. Thus, as to any defendant against whom all of the claims in the Second Amended Complaint have not been dismissed with prejudice the Court will consider permitting plaintiffs to amend the claims they have already alleged. The Court has found that some of these claims are wholly without legal merit and cannot be amended, but as to the others, the Court does not wish to deny the plaintiffs their day in court. Nevertheless, no leave will be granted to state

other claims not now included in the Second Amended Complaint.[84] At some point the litigation over these issues must be brought to a conclusion. The Court has an obligation to see to it that point is reached within a reasonable time frame.

DATED: September 8, 1992

/s/MARIANA R. PFAELZER
Mariana R. Pfaelfier
United States District Judge

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[84] The Court recognizes that class action complaints based on securities law violations are often framed so as to allege everything possible against every person possible. This enhances the chances of settlement, of course, but the federal rules do not permit plaintiffs to plead their case differently depending on whether they are ultimately going to settle it or try it.